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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 BRIAN HAWKS,

4 Plaintiff, New York, N.Y.

5 v. 09 Civ. 9923 (RMB)

6 C. GUNSETT, D. MAZELLA, E.
7 CRUZ, C. GRAVELINE,

8 Defendants.

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9 July 24, 2013

10 10:00 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 LITTLER MENDELSON

Attorneys for Plaintiff

16 BY: IVAN R. NOVICH

LAUREN J. MARCUS

17 ERIC T. SCHNEIDERMAN

18 Attorney General of the State of New York

19 BY: MARY KIM

JASON CLARK

20 Assistant Attorneys General

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(In open court; jury not present)

THE COURT: The record should reflect that for over an hour I have been meeting with counsel to go over the jury instructions and the verdict sheet and to see if they had any comments and/or objections to the verdict sheet or the jury instructions. I indicated to them that before we finalized the charges, they would have the opportunity, which is now, to comment and/or object to any instruction or any aspect of the verdict sheet if they wanted to.

So I would turn first to the plaintiff and ask if you have any comments or objections to the charges as we have been discussing them in the robing room or the verdict sheet?

MR. NOVICH: No, your Honor.

THE COURT: How about, Ms. Kim?

MS. KIM: Your Honor, the only objection we have is the exclusion of the instruction on qualified immunity.

THE COURT: What that means is I had indicated in the charge conference that I thought we should not include a charge of qualified immunity because the issues of qualified immunity are really incorporated in a sense into the jury instruction as to excessive use of force. So it would be at best confusing to the jury and I don't think applicable as a legal matter in this case, but Ms. Kim certainly has the right to object.

Did you want it in or out. Go ahead, Ms. Kim.

MS. KIM: In. Thank you.

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1 THE COURT: Did you want that charge in or out, Mr.
2 Novich?

3 MR. NOVICH: Out, judge.

4 THE COURT: So you're content with the way we
5 concluded the charge conference, which I indicated I was taking
6 it out.?

7 MR. NOVICH: Yes, your Honor. I agree with your
8 Honor's position.

9 THE COURT: So then we'll wait a couple minutes and
10 see how many jurors have present and we'll go off the record.
11 If you want to take a break or review your notes or prepare for
12 your summations that is fine.

13 David here will be in charge for the near term.

14 (Recess)
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(In open court; jury present)

THE COURT: Please be seated everybody. Where we are is, which I suggested we would be yesterday, at summations. In civil cases such as this one the defense usually goes first in summation and the plaintiff goes second. The defense is entitled if they want to have a brief rebuttal thereafter. So we'll start with Ms. Kim for the defense.

MS. KIM: Thank you, your Honor.

Good morning, ladies and gentlemen. You have been here for three long days. It is almost over. I will try to keep it short or as brief as I can. First on behalf of my colleague Jason Clark and our clients Officers Mazzella, Gunsett, Graveline and Cruz, I want to thank you for your time here and for listening.

Now, on the first day of trial you heard the opening statement from the plaintiff's counsel, Mr. Novich. He made a dramatic opening and went on about how this case is about a man who has been wronged by the justice system, about a man who is a victim of circumstances, a victim of Corrections officers who pick on him and assault him for no reason. Now that you have heard all the evidence, you know none of that is true.

By the way don't get me wrong, I am not personally attacking Mr. Novich. He is just doing his job. I am not picking on him, but I am going to pick on the words that he used during his opening because the evidence does not support

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1 what he said. He did not prove what he promised you that he
2 would prove on behalf of Mr. Hawk's case.

3 Now, you may recall Mr. Novich stated this is a case
4 about an abuse of power and a misuse of authority. Ladies and
5 gentlemen, this is not a case about abuse of power or misuse of
6 authority. This is a case about aggression against authority,
7 Mr. Hawks' aggression against authority. You saw Mr. Hawks on
8 the stand. You heard him testify. He said some things that
9 proved that he has an aggression toward Corrections officers.
10 He acknowledged that as an inmate he is obligated to follow the
11 direct orders of Corrections officers and he picks and chooses
12 when he feels like following their orders. He admits that he
13 has argued with officers depending if they agree with his
14 direct order or not or whatever his mood is that day.

15 Now, you heard from Officer Mazzella that at Green
16 Haven, a maximum security prison, there are approximately 2,000
17 inmates to approximately 100 officers on any given shift.
18 There are rules in place for a reason. You heard the officers
19 testify that they are there to keep the peace and specifically
20 to keep the inmates themselves safe as well as their fellow
21 officers. With approximately 2,000 inmates to approximately
22 100 officers on any given shift, imagine if every inmate
23 behaved the way Mr. Hawks behaves -- arguing with officers, not
24 listening to their direct order, lashing out at officers
25 whenever he feels like.

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1 Now, Mr. Novich is going to stand here before you
2 after me and he is going to make a passionate speech about how
3 Mr. Hawks is a victim. He is going to try and make this case
4 about the justice system and the prisons, about how on five
5 occasions Mr. Hawks was found guilty of assaulting officers
6 without a lawyer or a jury or about how badly he was injured
7 during the August 25th, 2007 incident or how awful confinement
8 in the Special Housing Unit is. This case is not about any of
9 those things. This case is about one day, November 1st, 2007,
10 and what happened that day.

11 This case is not about the justice system or our
12 society as a whole, the Department of Corrections, Green Haven
13 Correctional Facility, Fishkill Correctional Facility or any
14 other officer other than the four officers who sit before you
15 today. These four men have been wrongly a used of violating
16 Mr. Hawks' constitutional rights.

17 Now, let's talk about motive. Mr. Hawks claims that
18 Officer Mazzella threatened him on August 25th, 2007 saying, "I
19 will get you," or something to that effect. Mr. Hawks claims
20 that Officer Mazzella paid him a special visit at the hospital
21 and said this to him. Come on. This is not a movie. It is
22 not a TV show. You know that didn't happen. It turns out that
23 Mr. Mazzella escorted Mr. Hawks to the hospital that day
24 because it was his job and he along with a sergeant and two
25 other officers took Mr. Hawks to the hospital. And what

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1 happened on that trip to the hospital? Nothing. Mr. Hawks
2 wasn't touched. There wasn't another use of force. Nothing
3 happened.

4 Then Mr. Hawks claims that after the November 1st,
5 2007 incident was over, Officer Mazzella said to him, "I told
6 you I would get you," or something to that effect. When did
7 Officer Mazzella say this to him, with the entire Fishkill
8 response team and a Fishkill sergeant in the room? We know
9 that didn't happen. Mr. Hawks does have the evidence to back
10 up his outlandish allegations so he resorts to lies and Mr.
11 Novich resorts to innuendos and he tries to play on your
12 sympathies in his opening statement and his questioning. Mr.
13 Novich even used the word "profile" in his opening statement.
14 He said Officer Gunsett profiled Mr. Hawks. What does that
15 mean? We know it is a code word for something, but it just
16 makes no sense in this context.

17 Officer Gunsett escorted Mr. Hawks to Fishkill. That
18 is just part of his job. Mr. Hawks had a medical appointment
19 at Fishkill. He escorted him along with Officer Mazzella and
20 Officer Cruz. Officer Gunsett didn't randomly pick Mr. Hawks
21 out to have a use of force incident with him. Why is he saying
22 things like that in his opening? It is because he wants to
23 prejudice you against these officers, not with evidence that he
24 could prove but with code words and innuendos calling these
25 officers prison guards rather than by their official title,

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1 Corrections officers. Don't fall for it, ladies and gentlemen.

2 Again, it may sound hard. I am the not picking on Mr.
3 Novich personally. He is just doing his job.

4 Getting back to motive. Mr. Novich will stand before
5 you and argue to you that Officer Mazzella had a motive for
6 assaulting Mr. Hawks and Officer Mazzella knew that Mr. Hawks
7 assaulted another officer, an officer named Officer Mallius who
8 he was friendly with because they were coworkers and that
9 Officer Mazzella assaulted Mr. Hawks to retaliate for what
10 happened to Officer Mallius. What evidence did they present
11 you of this other than Mr. Hawks' incredible and self-serving
12 testimony that Officer Mazzella supposedly said, I" am going to
13 get you" and "I told you I would get you"? You know that is
14 all just made up.

15 Mr. Novich might even tell you that Officer Mazzella
16 was lying in wait for the opportunity to hurt Mr. Hawks. Now,
17 we know that Officer Mazzella took Mr. Hawks on trips to
18 Fishkill twice between the August 25th, 2007 incident and the
19 November 1st, 2007 incident. What happened during those trips?
20 Nothing. In fact, during those trips Mr. Hawks was the only
21 inmate being escorted by three or four officers including
22 Officer Mazzella. If Officer Mazzella was indeed lying in wait
23 to hurt Mr. Hawks, wouldn't those other times have been better?
24 Why wait until Officer Mazzella had five other inmates to worry
25 about? When you listen to Mr. Novich's statements after me,

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1 listen for what evidence, solid evidence, he has to prove this
2 alleged motive on the part of Officer Mazzella. I guarantee
3 you that you will not hear any solid evidence. All you will
4 hear is Mr. Hawks' lies and Mr. Novich's innuendos.

5 Let's talk about where this incident took place. It
6 took place at Fishkill, not at Green Haven where Officer
7 Mazzella and Gunsett work where they would be more comfortable
8 and they knew other officers. They don't know the other
9 officers at Fishkill. Why would they decide to hurt Mr. Hawks
10 there? What about this room where the incident occurred? Mr.
11 Novich made a big deal how Mr. Hawks was taken into this room
12 alone so that the officers could isolate him. You heard the
13 testimony about the layout of this RMU basement where this is
14 located. There is an officer in the bubble right outside the
15 room. There is a bullpen full of inmates right next door.
16 There is a dialysis engineer next door with officers, inmates
17 and medical personnel. There was no hiding going on.

18 In fact, it didn't take too long before a code was
19 called and an entire response team responded and a superior
20 officer, female sergeant, Sergeant Kennedy also responded.
21 This was not done in hiding where these officers could get away
22 with it. In fact, Officer Graveline was walking by to lunch
23 when he heard a commotion and came to assist. Officer Cruz who
24 was in the bullpen with the other inmates also heard commotion
25 and came to assist. The door to that small room wasn't closed.

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1 Nobody was hiding.

2 Mr. Novich might also say Officers Mazzella and
3 Gunsett picked Mr. Hawks out to be the first one in that room
4 alone, but in fact the evidence shows that is not the case.
5 The officers were just doing their job. They were just
6 following usual protocol. They took one inmate out at a time
7 into the room to shackle them. You heard Officer Gunsett
8 saying they don't want to deal with one more inmate when they
9 are trying to shackle. It makes perfect sense. One officer
10 handing the shackling equipment to another officer who is
11 putting the shackling on an inmate. Why would they want to
12 deal with six inmates in one room when they are shackling hands
13 and feet?

14 You also heard Officer Gunsett explain if it wasn't
15 Mr. Hawks in that room, it could have been any other inmate
16 taken one by one alone. It was an orderly process. There are
17 a number of inmates in the bullpen taken one at a time, put
18 them in a side room. Officer Cruz and the other officer were
19 there watching the inmates in the bullpen and Officers Gunsett
20 and Mazzella are shackling up the inmates in the room. Their
21 theory on the motive on the part of the Officer Mazzella and
22 Officer Gunsett has no basis in any evidence that you can rely
23 on and it also makes no sense.

24 Now, you heard Mr. Novich in cross-examining Officer
25 Mazzella and Officer Gunsett try to point out discrepancies in

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1 their testimony or what he wants to characterize as
2 discrepancies and in the memos that they wrote this incident.
3 You didn't hear anything. Were they caught in any lie? Is
4 that all they have got? It is all a bunch of red herrings.

5 Now, this whole business of two closed fists. The
6 officers wrote that the Hawks was punching at them with two
7 closed fists. Mr. Novich is going to come up here and say
8 these officers lied, that Mr. Hawks couldn't have been punching
9 with two closed fists. The medical reports said he could have
10 made a fist with his left hand. Well, Mr. Hawks was examined
11 after this incident happened. That medical record was written
12 after this incident happened and Mr. Hawks himself claims he
13 reinjured that wrist. There is no evidence he could have made
14 a fist with his left hand before the incident. In any case,
15 what difference does it make? The officers saw Mr. Hawks
16 swinging at him with two fists. Was one hand in a fist? Were
17 both hands in a fist? What difference does it make?

18 In cross-examining Officer Mazzella, Mr. Novich tried
19 to point out in the deposition testimony where he testified
20 that when asked, Did you see Mr. Hawks take his hands out of
21 his pocket, and officer Mazzella said, No. But Officer
22 Mazzella knew Mr. Hawks had taken his hands out of his pockets.
23 Maybe he didn't see it at that moment. He knew because he
24 heard Officer Gunsett standing right next to him staying to
25 Mr. Hawks, What are you doing? I didn't tell you to take your

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1 hands out of your pockets. Is that a lie? Was Officer
2 Mazzella caught in a lie?

3 Now, Mr. Novich tried to point out the officers' memos
4 and tried to discredit them with those memos. When you go back
5 into the jury room, you will have the entire set of memos that
6 everyone filled out in connection with this incident. You are
7 free to read them. In fact, I invite you to read them. You
8 will see that they all described the incident as the officers
9 described to you on the stand. You will find the truth in
10 those documents. In particular, please read the memo of the
11 superior officer, Sergeant Kennedy.

12 I will briefly show it to you so you know what to look
13 for. It is going to be in Defendant's Exhibit 1. In any case,
14 it will be Defendant's Exhibit 1 and the page on the bottom
15 will say 63. That memo describes what that sergeant, the
16 superior officer, saw when she respond to the incident. I will
17 not waste your time reading that to you.

18 Then there was this whole business that Mr. Hawks had
19 his cast cut short and part of his wrist was still in a cast
20 when this happened. Let's look at the photo of Mr. Hawks' left
21 arm taken after the incident. There is no cast. There was no
22 testimony that after the incident he had this alleged shortened
23 cast off.

24 Now, why are they making a big deal about this cast?
25 It is not a big deal and you shouldn't get lost in that

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1 minutia. He was thinking of an excuse as to why Mr. Hawks was
2 not complying with the orders to keep his hands in his pockets.
3 My cast was there so I couldn't get my hand in my pocket.
4 Mr. Hawks did testify that he did put his hands in his pockets
5 at certain times during that day. Mr. Hawks also admits that
6 Officer Gunsett did tell him to keep his hands in his pocket
7 before this incident broke out.

8 (Continued on next page)

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Summation - Ms. Kim

1 MS. KIM: Now if officers Gunsett and Mazzella took
2 Mr. Hawks into this little room to beat him up, what is with
3 all the keep your hands in the pockets?

4 What is clear is that this would have been just
5 another day like any other day when an inmate is transferred
6 from Green Haven to Fishkill. It would have been like the
7 other two times when officer Mazzella took Mr. Hawks to
8 Fishkill. Nothing would have happened. There would have been
9 an orderly process and everybody would have been taken back to
10 Green Haven safely. In fact, Mr. Hawks admits that the
11 officers were just doing their job that day. Whether it was in
12 a moment of clarity or he slipped and actually told the truth,
13 he said at his deposition, and I'll read it to you:

14 "Q. Did they give you an order not to resist?

15 "A. Yeah. They kept telling me to be still, don't move, stop
16 resisting, stop resisting. Of course they're going to tell me
17 that because that's what they're trained to do and I guess
18 that's what -- I guess I'm trained to do what I've got to do to
19 try to prevent myself from getting hurt. I'm not trained the
20 way they're trained, but just like they don't know how trained
21 I am to defend myself. It was just one of those things where
22 they had to do what they had to do to get the job done the best
23 they knew how and secure everybody and make their job safe and
24 try to apprehend me."

25 Now, why would the officers be telling Mr. Hawks to

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Summation - Ms. Kim

1 stop resisting and don't move if they are just out to assault
2 him.

3 Now let's talk about Mr. Hawks' motive. What about
4 his motive for assaulting and battering officers Mazzella and
5 Gunsett. What do we know about Mr. Hawks? He doesn't like
6 being in prison. Who would. He doesn't like being told what
7 to do. He doesn't like taking direct orders, although as an
8 inmate he is required to comply with an officer's direct
9 orders. And when he's had enough of taking orders, he lashes
10 out violently against officers and assaults and batters them.

11 Now you heard about four other occasions where
12 Mr. Hawks was found guilty of assaulting officers after failing
13 to follow their orders. He claims that he didn't have a
14 lawyer; there was no jury; the officers are the ones who
15 assaulted him, and he was just defending himself. He was the
16 victim in all those instances.

17 Now he denies everything he was charged with in those
18 misbehavior reports we discussed and on which he was found
19 guilty after the Tier III hearings, where he was allowed to
20 present evidence and witnesses and had assistance from other
21 inmates and also even correction officials.

22 Really? In all of those instances, in three separate
23 prisons -- Attica, Green Haven, and Southport -- he just
24 happened to get into all of these violent situations as the
25 victim and then was found guilty on each occasion because he

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Summation - Ms. Kim

1 didn't have a lawyer to represent him? We know that's not
2 true.

3 Let's go through those incidents. There are four
4 others aside from the one we are here for today. The first
5 one, January 25, 2005, at Attica Correctional Facility,
6 Mr. Hawks received a misbehavior report for and was found
7 guilty of assaulting staff, engaging in violent conduct and
8 disobeying a direct order. In that incident, officer Mariani
9 was escorting Mr. Hawks from one cellblock to another when
10 Mr. Hawks tried to run away from officer Mariani. When the
11 officer gave Mr. Hawks a direct order to stop, what did
12 Mr. Hawks do? He turned around and punched officer Mariani in
13 the jaw.

14 Number two, August 25, 2007 at Green Haven
15 Correctional Facility. Mr. Hawks received a misbehavior report
16 for and was found guilty of disobeying a direct order,
17 assaulting staff and engaging in violent conduct. On that day
18 Mr. Hawks began arguing with officer Sabino, a female officer,
19 who then gave Mr. Hawks several direct orders to walk back in
20 his cell. Mr. Hawks refused, causing officers Mallius and
21 Calazzo to step in between Mr. Hawks and this female officer
22 and then they tried to escort Mr. Hawks back to his cell.

23 And then what happens? Mr. Hawks turns and punches
24 officer Mallius several times, and then officer Calazzo tries
25 to help officer Mallius and then Mr. Hawks punches officer

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Summation - Ms. Kim

1 Calazzo too.

2 Number three, October 22, 2008 at Southport
3 Correctional Facility. Mr. Hawks received a misbehavior report
4 for and was found guilty of disobeying a direct order,
5 assaulting staff and engaging in violent conduct. In that
6 incident officer Lozido was moving Mr. Hawks from one cell to
7 another when Mr. Hawks turned and headbutted officer Lozido in
8 the face. Then officer Butler and sergeant Chapman appeared
9 and tried to get Mr. Hawks back into his cell and he struggled
10 with them too. Then officer Frisbee tried to get control of
11 Mr. Hawks' legs and he kicked officer Frisbee.

12 Number four, the final one, April 30, 2011 at
13 Southport Correctional Facility. Mr. Hawks received a
14 misbehavior report for and was found guilty of attempted staff
15 assault and violent conduct. In that incident Mr. Hawks was
16 directed to back out of his cell, when he turned his shoulders
17 violently and attempted to strike officer Thacher with his
18 elbow.

19 Now focusing on the August 25, 2007 incident, during
20 Mr. Hawks' direct examination by Mr. Novich, they went on and
21 on about the injuries that Mr. Hawks sustained during this
22 violent melee. There is no denying Mr. Hawks sustained
23 injuries. He even broke his left wrist. But what happened to
24 the officers involved? Officer Calazzo's nose was broken and
25 officer Mallius was so badly hurt he never returned to work.

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Summation - Ms. Kim

1 Imagine the violent struggle that occurred during that
2 incident. It took five officers to restrain Mr. Hawks. Of
3 course Mr. Hawks was hurt. But he wasn't the only one hurt,
4 was he? If Mr. Hawks was simply the victim just defending
5 himself and putting his arms up to cover his face, as he claims
6 he always does in all of these incidents, how did officer
7 Calazzo's nose break, how did officer Mallius get so badly
8 injured that he can never work. You can't believe Mr. Hawks'
9 denials and claims of simply being a victim.

10 Now what do all these four other incidents have in
11 common with the November 1, 2007 incident? Mr. Hawks was given
12 a direct order to do something by an officer. He didn't feel
13 like complying with that direct order and in a rage he
14 physically attacked the officers. Just like here, officer
15 Gunsett gave him a direct order to keep his hands in his
16 pockets. He didn't feel like complying with that direct order
17 and in a rage, he punched officer Gunsett and then he bit
18 officer Mazzella.

19 Imagine the anger, rage and aggression inside a person
20 that makes him bite another human being. He wasn't biting
21 officer Mazzella just to defend himself. He wasn't a victim.
22 He punched officer Gunsett and he bit officer Mazzella out of
23 pure anger, because on that day, at that particular moment,
24 Mr. Hawks decided that he had had enough of these officers
25 telling him what to do. He had an attitude all day with

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Summation - Ms. Kim

1 officer Gunsett. He was huffing and puffing at every direction
2 that officer Gunsett gave him that day. And at that moment
3 Mr. Hawks just had enough.

4 And you heard the testimony of nurse Davis. He is not
5 a party to this case. He has no dog in this fight. He doesn't
6 even know officers Mazzella, Gunsett, and Cruz. He knows
7 officer Graveline from having worked with him at Fishkill. But
8 he hasn't even seen officer Graveline in years.

9 What did nurse Davis say? Nurse Davis said he
10 responded to the incident and he saw how angry Mr. Hawks was.
11 In fact, this was almost six years ago but he has a clear
12 memory of that because of how angry Mr. Hawks was and how nurse
13 Davis himself feared for his own safety. In fact, he called on
14 a high security official and said, look, I'm concerned about
15 examining this inmate. His nostrils are flaring. There is
16 just pure anger coming from him. And nurse Davis said that
17 incident really stuck out in his mind. He has examined
18 hundreds of inmates. That one, Mr. Hawks, really stuck out in
19 his mind.

20 Nurse Davis did not see a victim when he arrived on
21 the scene. Nurse Davis didn't describe an inmate who was
22 scared, who was cowering because officers suddenly assaulted
23 him and he was just defending himself.

24 Now, what Mr. Hawks claims is that these four officers
25 used excessive force on him and violated his constitutional

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Summation - Ms. Kim

1 rights and that these officers repeatedly punched and kicked
2 him. You saw the photographs of Mr. Hawks, and you will also
3 have them in the jury room, and you heard the testimony of
4 nurse Davis. Nurse Davis described Mr. Hawks' injuries as
5 superficial abrasions, bruising and swelling. There were no
6 broken bones. There were no serious injuries.

7 Those injuries are not consistent with plaintiff,
8 Mr. Hawks' claim that he was repeatedly punched and kicked by
9 four officers. As you can see, they are not exactly petite
10 men. Those injuries are consistent with a reasonable force
11 that had to be used to get control of this violent, angry,
12 punching, biting, kicking and thrashing inmate.

13 This was not excessive force. This was, in fact, a
14 measured response on the part of these officers. And because
15 of their measured response, despite the violence of Mr. Hawks,
16 there was minimal injury caused to Mr. Hawks and the officers
17 themselves.

18 Now, we don't dispute that officer Gunsett punched
19 Mr. Hawks. What was he supposed to do? He is faced off with
20 an inmate who just punched him in the face. His natural
21 response was to punch him back, get him on the floor. We don't
22 dispute that officer Gunsett kneed Mr. Hawks in the forehead to
23 release the bite that he had on officer Mazzella's arm. We
24 also don't dispute that there was a violent struggle with four
25 officers having to lay their hands on Mr. Hawks to get him

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Summation - Ms. Kim

1 turned over onto his stomach so that they could get his hands
2 behind his back and cuff him.

3 This also happened in a small room in front of a
4 bench, and Mr. Hawks went over that bench and fell onto the
5 floor and then he tried to get up and officer Gunsett pushed
6 him with both hands on his chest to get him back on the floor.

7 Now, when you go back into the jury room maybe one of
8 you might say did officer Gunsett really have to punch
9 Mr. Hawks? Did he have to knee Mr. Hawks in the forehead? I
10 am going to read something to you. As Judge Berman explained
11 at the beginning of the trial, he is the determiner of the law,
12 you are the determiner of the facts. But I am going to read a
13 part of the charges that the judge will read to you after we
14 are done, and this goes to the claim of excessive force, what
15 Mr. Hawks has to prove.

16 In order to establish his claim for a violation of the
17 Eighth Amendment, plaintiff must prove that defendants used
18 force against him maliciously, for the purpose of causing harm,
19 rather than a good faith effort to maintain and restore
20 discipline. It is not enough to show that in hindsight the
21 amount of force seems unreasonable. The plaintiff must show
22 that the defendants used force maliciously, with a purpose of
23 causing harm.

24 Hindsight is 20/20, right?

25 Now you heard Mr. Novich question the officers about

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Summation - Ms. Kim

1 how many specific strikes landed on Mr. Hawks' face and body,
2 and he might put up the photos and the medical record of
3 Mr. Hawks' injuries and point out all of the areas where these
4 specific strikes don't match up to the injuries. Now is that
5 fair? This is a violent struggle with four grown men tussling
6 with an inmate who is violently fighting them in that small
7 room with the bench and the wall directly behind that bench.
8 In fact, I will show you the photos.

9 This is the bench that Mr. Hawks went over. There is
10 a wall there. He went over that bench. He tried to get up.
11 Officer Gunsett had to push him down again on the floor.

12 Here is another perspective. You will have these
13 photos in the jury room.

14 There are going to be scrapes, bruises and swelling on
15 Mr. Hawks' head and body that the officers can specifically say
16 I hit Mr. Hawks here, here and here or Mr. Hawks went back, hit
17 his head on the wall or the scrapes on his neck. Some of those
18 things the officers are not going to be, won't be able to
19 specifically account for because this was a violent melee.
20 Four grown men and an inmate struggling.

21 Now let's talk about what is real. What is the truth?
22 Mr. Hawks comes into this court and lies up and down. I
23 couldn't keep track of how many different stories he told and
24 all the excuses he had for why he said one thing one time and
25 another thing another time all under oath. He did bite officer

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Summation - Ms. Kim

1 Mazzella, he didn't bite officer Mazzella. And when confronted
2 with false testimony that he gave under oath at his deposition,
3 Mr. Hawks claimed that he was angry or he was scared or it was
4 the stenographer that mistranscribed his answers. There was no
5 misunderstanding of that question.

6 At his deposition Mr. Hawks testified as follows:

7 "Q. Did you bite him?" Meaning officer Mazzella.

8 "A. No, not at all. Not at all."

9 Then he comes in here and admits that he bit officer
10 Mazzella because he knows the evidence would prove that he did,
11 and then he says he lied at his deposition because he was
12 angry, scared, the stenographer mistranscribed his answers.
13 That is just one example of how Mr. Hawks has lied. I won't
14 waste your time with all the other instances. We will be here
15 all day.

16 Ladies and gentlemen, you can't believe a thing that
17 Mr. Hawks says. He admits that he lies depending on his mood,
18 whether he is angry or not. Well, if the truth is on your
19 side, why are you ever lying? You file a lawsuit and if you
20 have the truth to back it up, why not just tell the truth every
21 single time. The nerve of him. He assaults and batters
22 officers causing them to react and use force on him, to gain
23 control of him, and then he drags them into court like this and
24 asks you to award him money because he is the victim. Don't
25 fall for it, ladies and gentlemen.

D7OHHAW2

Summation - Ms. Kim

1 Now when you get back to the jury room one of you
2 might say, you know, Mr. Hawks has a left wrist that just
3 healed and he was injured in August, just a couple of months
4 before this incident. Why would he start another fight with
5 officers. That would be a logical question if you were dealing
6 with a logical person.

7 There is no need for you to determine exactly why
8 Mr. Hawks behaves the way he does. That is not something you
9 need to figure out to decide this case. All you need to
10 determine is has Mr. Hawks proved by a preponderance of the
11 evidence that these officers used excessive force against him
12 in violation of the constitution.

13 Mr. Novich might get up and, as he did in his opening,
14 he might say 51 percent, that is all we have to prove to you,
15 51 percent. Did he even get there? I think we know what the
16 truth is 100 percent.

17 So he assaults officers and sues them and what does he
18 have to lose? Anyone can file a lawsuit. That brings us to
19 the question of officers Mazzella and Gunsett's counterclaims
20 for assault and battery.

21 You may go back in that jury room and you might be
22 thinking, why are these officers suing Mr. Hawks. They had
23 such minor injuries. Do they really expect to get money from
24 Mr. Hawks. We are not claiming that the officers were
25 seriously injured, and it is not about money. It is about

D7OHHAW2

Summation - Ms. Kim

1 sending Mr. Hawks a message. You will no longer get away with
2 assaulting officers and then filing a bogus lawsuit claiming
3 that they used excessive force on you. You will have to answer
4 for your conduct. You will no longer think you have nothing to
5 lose when you assault officers and then sue them and then come
6 into court and lie.

7 I think we all know what the truth is here. The
8 evidence clearly proves it. On four other occasions, separate
9 and apart from this November 1, 2007 incident, Mr. Hawks
10 assaulted officers, and he assaulted officers because on that
11 particular day, for whatever reason, he had enough of listening
12 to their orders. And that's what happened here on November 1,
13 2007.

14 THE COURT: Ms. Kim, are you about to wrap up?

15 MS. KIM: Yes.

16 Mr. Hawks had enough of officer Gunsett telling him
17 what to do and he again acted out his aggression, and the
18 officers in response used reasonable force, not excessive
19 force, a measured response on the part of these officers
20 quickly getting a violent situation under control with minimal
21 injury to the inmate and themselves. These officers shouldn't
22 be found liable. They should be commended for it.

23 Thank you.

24 THE COURT: Before Mr. Novich, ladies and gentlemen,
25 you remember that during the trial when there was evidence

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Summation - Ms. Kim

1 regarding other incidents involving Mr. Hawks and when there
2 was that testimony I gave you an instruction as to how to
3 consider that evidence. The same is true for oral argument or
4 summations. It has come up again, these other incidents. I am
5 going to include that same instruction when I get to the jury
6 charges in a moment, but just to remind you, as I have said now
7 on a couple of occasions, part of that instruction is this.

8 I said, testimony regarding other incidents in which
9 plaintiff may have been involved may not be considered for the
10 purpose of proving plaintiff's propensity to engage in the
11 altercation described in this case or proving that plaintiff
12 was at fault in the altercation here. Specifically, you may
13 not find that simply because plaintiff was involved in other
14 assaults with other officers on other occasions plaintiff has a
15 propensity for violence and thus, it is more likely than not
16 that he provoked the altercation and/or committed an assault
17 and battery on defendant officers in this case.

18 There was a little more to it earlier and I will give
19 you the full instruction as part of today's instructions.

20 Mr. Novich.

21 MR. NOVICH: Thank you, your Honor.

22 Good morning, everyone. In the home stretch. So this
23 is a case, as I told you at the beginning, about prison guards,
24 the defendants, who abused their power, who abused their
25 authority, who took things too far because they felt they

D7OHHAW2

Summation - Mr. Novich

1 could, and who engaged in excessive force because they beat
2 Brian Hawks.

3 Now, let's just talk a little bit about what is going
4 to happen. When I am done, Ms. Kim may have some final words,
5 she may not, and the judge is then going to instruct you. That
6 will probably last about an hour. Then you are going to go
7 back to the deliberation room. You are going to pick a
8 foreperson and then you are going to go around the table and
9 talk about the case, share your views. Now these are some
10 things I want you to keep in mind, I am asking you to keep in
11 mind, talk about when you have that discussion.

12 First of all, the judge is going to instruct you on
13 the burden of proof. You are going to see that. I am not
14 coming up with this 51 percent. That's the law. The burden of
15 proof in a civil case is preponderance of the evidence. It is
16 not a criminal case. It is really important that you
17 understand that distinction. Criminal case is beyond a
18 reasonable doubt. That is way up here. Burden of proof in a
19 civil case is preponderance of the evidence, more likely than
20 not.

21 The classic example is the scales of justice. I don't
22 know if you any of you came in on the Pearl Street entrance.
23 There is that Lady Liberty with the scales. The scales are
24 even at the beginning of the trial. As the evidence comes in
25 on either side, if those scales just tip a little bit, that's

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Summation - Mr. Novich

1 preponderance. You put a feather, you put a pebble here, they
2 tip. That's preponderance. That is 51 percent. That is more
3 likely than not. That's your job. Your job is not to say was
4 there clear and convincing evidence that this all happened.
5 No. Your job, to do your job, is just to find who's got the 51
6 percent. Do we have it, do they have it. That is what you
7 have to do.

8 All right. Now the other thing the judge is going to
9 instruct you -- and this is really important. You guys are the
10 fact finders. What you have to keep in mind, and the judge is
11 going to instruct you on this, you have to use your common
12 sense. Common sense is key. You have got to use your
13 experience. What do they tell you based on the testimony,
14 based on the evidence you see.

15 Now, I have limited time. You have already seen the
16 evidence. I am going to try not to belabor it and get you out
17 of here, but let's talk about some of that evidence.

18 The photos. I told you I was going to prove this case
19 two ways -- based on the photographic evidence and based on the
20 medical evidence. You saw the photos. You are going to have
21 them back there of Mr. Hawks. You going to have them back
22 there of the four defendants. Who looks like they were beaten?
23 Mr. Hawks, right? He's got the injuries to his face, to his
24 head. That's a nonissue. That's a given. He was beaten. He
25 was hit.

D7OHHAW2

Summation - Mr. Novich

1 Now you are going to look at the photos -- again, we
2 are just talking about the photos now. We are going to talk
3 about the other evidence. You are going to look at the photos
4 of the defendants. Do they look like they have been attacked?
5 Do they look like they have been assaulted? What did officer
6 Gunsett, defendant Gunsett tell you? He said, yeah, I was
7 sucker punched. Right? He said he got coldcocked. Where is
8 that? You don't see any of that.

9 Defendant Mazzella, you see him. Does he look like he
10 was attacked? The other two defendants who came later on the
11 scene. There is no scaring on anybody's face. The only one
12 who has the scaring and the bruises and the abrasions is
13 Mr. Hawks. That's consistent, right, whether you believe him
14 or not, that is consistent with somebody who has been beaten,
15 those photographs.

16 The medical evidence, let's talk about that. Again, I
17 am not going to put it up there on the screen. You already
18 know what I'm referring to. Nurse Davis' report. Right. That
19 cataloged for you all the different numbered injuries Mr. Hawks
20 had.

21 When you go back there, and it is D1, page 54, that's
22 the diagram with the body parts and all the different circles
23 all over Mr. Hawks' body and then cataloging that out. Add
24 those up. When I add it up, I count somewhere between ten and
25 13 injuries. Ten and 13. Do the math.

D7OHHAW2

Summation - Mr. Novich

1 What did defendant Gunsett tell you? Two strikes. I
2 made that point really clear with him. Two strikes. Two
3 strikes does not equal ten to 13 injuries. That math just does
4 not add up.

5 Ms. Kim is talking about Mr. Hawks being scraped
6 against a wall. Who did you hear that from? No one. No one
7 told you will he was scraped against the wall.

8 What did defendant Mazzella tell you? He was on his
9 back like a turtle, right, flailing around. That was the image
10 he used. A turtle? A turtle is a defenseless creature on his
11 back. OK.

12 Now let's talk about the medical evidence regarding
13 the defendants. I showed you the employee accident report and
14 I put it on cross-examination up for defendant Gunsett. The
15 box. He went to work that day. No medical attention required
16 was not checked. No first aid, not checked. They even
17 described their injuries as not significant. And again, that
18 is important. You are saying you are sucker punched, you are
19 saying he attacked you, the evidence should corroborate it, and
20 it doesn't.

21 Mr. Mazzella's bite. What did he tell you? He had no
22 bandage. He didn't even get a band aid. No band aid? No
23 puncture, no bleeding.

24 Now we are moving on. Now I told you at the beginning
25 of this case you are going to hear of course from them, they

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Summation - Mr. Novich

1 are going to come into this court, he was resisting, he started
2 the fight. I also told you only two of them were actually
3 there. Right? I told you that it was defendant Gunsett and
4 defendant Mazzella who were actually there. So defendant Cruz
5 and defendant Graveline, they didn't come into the scene until
6 afterwards, and I specifically asked them on cross-examination,
7 did you see who threw the first punch? No, no. They don't
8 know how many strikes happened before they got there.

9 So when you are considering the evidence and the
10 testimony, you have got to focus on Mazzella and Gunsett.

11 Now let's look at their versions of the events.

12 What did I tell you at the beginning of the case.
13 Their versions contained all sorts of inconsistencies, all
14 sorts of things where their stories are not credible. Their
15 stories don't make sense. These are law enforcement officers.
16 They represent the state. You have got to be comfortable with
17 these people telling the truth and making sure that what they
18 are saying happened actually happened. Consider that.

19 Let's talk about it. Let's talk about Mazzella's and
20 Gunsett's alleged version about how this assault happened.
21 What did they both write on that day of that incident, of the
22 assault on November 1st before they knew there was going to be
23 a lawsuit. He was swinging, Mr. Hawks, closed fists, plural,
24 closed fists. The nurse's report shows you that he couldn't
25 make a closed fist. That is what nurse Davis said. That is

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Summation - Mr. Novich

1 what the report said. You are going to have that.

2 This is where it gets really interesting. Think about
3 this. Stay with me here. Ms. Kim got up here and I think she
4 said or at least suggested, oh, well, what did the officers
5 say. He was swinging his fist and that is how he reinjured it.
6 Whoa, stop right there. What did officer Gunsett say? What
7 did the other officer say? There was one strike by Mr. Hawks,
8 right, to the head. OK.

9 No one said they struck him in that wrist. No one
10 said they punched him in the wrist. So how does that wrist get
11 reinjured unless they are beating him up. Think about that.
12 That doesn't make any sense, their version, that he reinjured
13 it somehow during the struggle unless, one, it is not true or,
14 two, they punched him there, they struck him there. You can't
15 have it both ways, right. The testimony from them and the
16 reports say one strike by Mr. Hawks. Their math does not add
17 up.

18 Now, Mr. Hawks came in. He told you he went in for
19 physical therapy that day, November 1st, and they cut the cast
20 down. Nurse Davis got up here and he said I don't know if
21 anybody else saw it before I did. And then I put the
22 photograph of his arm. You have that in evidence. I know
23 Ms. Kim put it up there real quick and she pulled it down real
24 quick. You are going to have it.

25 And what did nurse Davis do? I said, Do you see those

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Summation - Mr. Novich

1 outlines right there? Remember that testimony. Do you see
2 those outlines right there? What did nurse Davis say? I
3 didn't ask him that question. He said, You mean the indents?
4 Yeah, that's right, the indents. That's consistent with a
5 small cast that had been on his arm. So when you go back
6 there, take a look at the photo. You are going to see the
7 indents as well.

8 Now, I think once you get to their report on November
9 1st about the closed fists, case over. Their story doesn't
10 make any sense. They are the law enforcement officials. They
11 are giving you inconsistencies. That's a real problem there.
12 I think it is case over, 51 percent, verdict against the
13 defendants and make them pay for what they did. But there is
14 more inconsistencies, disturbing inconsistencies, that do not
15 make any sense. When you go back there you need to talk about
16 them.

17 Think about this one. Think about this. Mazzella,
18 when he was on the stand, he claimed that he saw Hawks punch
19 Gunsett. Right? Do you remember he said that? And then he
20 said -- but he admitted on cross-examination that he didn't see
21 Gunsett punch Hawks but somehow, right, Mr. Hawks fell over the
22 bench. Whoa. Let me give it to you again. He claimed,
23 Mr. Mazzella, that he saw Hawks punch Gunsett but admitted on
24 cross that he didn't see Gunsett then punch Mr. Hawks but
25 somehow he saw Mr. Hawks fall over the bench. Think about

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Summation - Mr. Novich

1 that, because they didn't. Think about it. How is that
2 possible?

3 So what he is saying is I saw the first punch come in
4 from Hawks and then I looked away. Come on. He looked away
5 after the first punch. He didn't see Gunsett punch him back.
6 Didn't happen. That doesn't make any sense. He sees the guy
7 fall over but he didn't see how. You have to ask those
8 questions. You have to talk about that stuff when you go back
9 there. Please.

10 Now let's talk about more inconsistencies. Mazzella
11 admitted on cross that he did not see Hawks remove his hands
12 from his pockets. Do you remember that? I asked him that
13 question on cross and he admitted it. Their whole case turns
14 on this. Their whole case is Mr. Hawks took his hands out of
15 his pockets. He was ordered to put them back in and then
16 allegedly he hauls off and punches Gunsett. Mazzella didn't
17 even see him remove his hands from his pockets. He admitted
18 that on cross-examination. Another inconsistency, discrepancy
19 that's got to raise questions for you.

20 Also, officer Gunsett, defendant Gunsett gave
21 different versions of what happened. First he said, well, you
22 know, I punched Hawks and then he fell to the ground. Remember
23 that. I punched Hawks and then he fell to the ground. But on
24 the day in question I showed him the accident report before the
25 lawsuit came in. What did he say? I took him to the ground.

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Summation - Mr. Novich

1 That's very different. You punch someone and they fall to the
2 ground versus I take him to the ground. Take him to the ground
3 is you are tackling somebody to the ground. Different versions
4 here.

5 Meanwhile, as I indicated before, officer Mazzella
6 says Hawks tripped over a bench. These guys are all over the
7 place.

8 Now what did Gunsett also admit that he said in his
9 deposition. He said that he believed that's when Mr. Hawks
10 punched him, after he told him to put his hands back in his
11 pockets. Believe? Believe? If somebody punches you, you
12 know. You don't believe it. You know it.

13 Now let's talk about motivations. I don't have to
14 prove it. It is not any of the elements the judge is going to
15 give you but it is something to think about. Again, using
16 common sense, does it make sense this is the way it happened.
17 It is not a mandatory element, but it is something to think
18 about.

19 Motivations. OK. We know about the August 25, 2007
20 incident. We know that Mr. Hawks was in an altercation with
21 officer Mazzella also at Green Haven where these same
22 defendants work and that officer Mazzella was friendly with
23 officer Mallius, the officer who was badly injured, and that he
24 blamed Mr. Hawks for that. What do we also know? We also know
25 that officer Mazzella transported Mr. Hawks to the hospital

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Summation - Mr. Novich

1 that same day. If you remember, I asked him on cross, do you
2 recall what you said to him and he said, no, I don't.

3 Now, again, I don't have to prove it but does it make
4 sense that that was the motivation? Remember Spock from Star
5 Trek controlled his emotions. When this situation unfolded on
6 November 1, 2007, officer Mazzella was Spock and he wasn't
7 thinking about that this is the guy who took my friend out.
8 Really? Does that make sense? Does your experience tell you
9 that, your every day experience and common sense.

10 Let's talk about officer Gunsett's motivations. What
11 did he say? Well, I didn't know on November 1st, I didn't see
12 that cast. How could you miss it. It's taking up his whole
13 arm, from the wrist to the forearm. So he says, I didn't see
14 it. But what does he tell you. This guy, I'm shackling him
15 and telling him to put his hands in his pockets and he is
16 giving me a hard time. He's huffing and puffing. He's
17 disrespecting me. He's battling me. Remember all that. And I
18 said to him, did you ask the guy what was wrong? Did you ask
19 him if he was having a problem? No. So he doesn't ask the guy
20 what's wrong, he doesn't ask Mr. Hawks what's wrong, he doesn't
21 ask him what his problem is and he doesn't see the cast. You
22 don't have to be a rocket scientist to figure out maybe it is
23 the cast, the fracture that is giving him a problem. That's
24 not disrespecting.

25 I used the word profiling. I use it for a reason.

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Summation - Mr. Novich

1 The reason is, you profile somebody when you don't know who
2 they are -- officer Gunsett said he didn't know Mr. Hawks prior
3 to November 1, 2007 -- and you make assumptions about that
4 person that are incorrect. And the assumption, the profiling
5 that officer Gunsett did that day, because he didn't know
6 Mr. Hawks, was that he was disrespecting him and he was giving
7 him a hard time. That wasn't the case at all.

8 Now we have to talk about this, Mr. Hawks and these
9 alleged other, these altercations, these other things. We have
10 a term for this. This is called poisoning the well. This is
11 called making you so scared of this guy -- this is the
12 tactic -- make you so scared of this guy, get you so upset with
13 him about stuff that didn't happen here and all this other
14 stuff, even though -- did she present any witnesses to you that
15 he did all these things? Did she present any documents? No,
16 you didn't see any of that.

17 When you go back there, flip through that book. Are
18 you going to see any evidence that that is what happened? That
19 is a distraction. That is a sideshow. That's hoping you get
20 so riled up either with anger or with fear that you ignore what
21 your job is to do. The judge gave you the limiting
22 instruction. Your job is to evaluate this case. That's it.
23 You are to evaluate this case and what happened.

24 You know, this is an Eighth Amendment case, and I am
25 going to talk a little bit more about the Eighth Amendment when

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Summation - Mr. Novich

1 I talk about the elements for a Section 1983 claim, which is
2 the claim for excessive force that Mr. Hawks is bringing so you
3 will understand that. But when our founders were writing the
4 Constitution, they didn't say, Eighth Amendment, no cruel and
5 unusual punishment for people except if you are a really bad
6 guy. Then they can beat the crap out of you. No. That's not
7 the way it works.

8 I don't know how many of you came in -- again, I
9 mentioned this before -- on the Pearl Street entrance during
10 the trial, but you have Lady Liberty there, and what is she
11 wearing? A blindfold, because justice is supposed to be blind.
12 You are not supposed to look at people's pasts and judge them
13 based on the past. Everybody gets treated the same under the
14 law. Everybody is the same, is entitled to the same
15 protections.

16 In this country, nobody is supposed to be -- the ideal
17 is -- is supposed to be above the law and nobody is supposed to
18 be below the law. Everybody is treated the same. So when they
19 start talking, when someone starts talking about but what about
20 all that prior stuff, remember that. Remember that. And
21 remember the limiting instruction the judge gave you as well.

22 And also, consider this. This is important too. All
23 this stuff about Mr. Hawks being a bad guy, right, really
24 angry. You have been with him for now two and a half, almost
25 three days. How is his demeanor in this case? You got to see

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Summation - Mr. Novich

1 him firsthand. He was asked some pretty tough questions by
2 Ms. Kim and, if I remember, that went on for a couple of days.
3 It stretched over. Did he ever get violent. Did he ever raise
4 his voice to her. Did he ever used any profanities. Did he
5 ever threaten her. Did he give anybody in this courtroom a
6 hard time. Did he sit there well behaved. So consider that as
7 well. You actually got to observe his demeanor.

8 All right. The Section 1983 claim, that is the
9 excessive force one. I am going to briefly talk to you about
10 the elements. The judge is going to instruct you on this.

11 The first element is were the defendants acting under
12 color of state law. That is a given. They were all acting as
13 prison guards at the time at Green Haven. It is undisputed.
14 It is even going to be in the judge's instructions. You can
15 just check that one off.

16 Was there a constitutional violation? I mentioned
17 this before. Eighth Amendment protects against cruel and
18 unusual punishment. You are going to see that in the
19 instructions when you get them. In the context of inmates,
20 that applies to excessive force case. You can't brutalize
21 inmates. I think everybody knows that you can't do that. The
22 Eighth Amendment is a safeguard there.

23 So if you find for Mr. Hawks, if you believe that the
24 evidence shows that what they did was engaging in excessive
25 force, it is a given that it is a violation of the Eighth

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Summation - Mr. Novich

1 Amendment and that a constitutional right was violated.

2 Some of the other elements you need to consider. Was
3 it an intentional act, was it done malicious and sadistically.
4 I asked, if you remember, defendant Mazzella, you would agree
5 with me that if an inmate is just sitting on a bench waiting
6 for instructions and the guard hauls off and punches him, that
7 would be an inappropriate use of force, that would be excessive
8 force. He admitted it would be. That is what we have here.
9 That is a given. When you punch somebody in the face, I submit
10 to you that is an intentional, malicious and sadistic act by
11 itself, by its very nature.

12 The judge is also going to instruct you --
13 constitutional violation sounds pretty hefty, but what the
14 judge is going to instruct you in the instructions is you
15 actually don't need to have any significant injury at all. If
16 it has violated your right to be free from excessive force, to
17 be free from unusual punishment, you don't need significant
18 injury. Here I would submit to you we got it. The medical
19 evidence and the photographs support it. But you don't need
20 it.

21 Proximate cause. The judge is going to instruct you
22 on that. All that means is were the defendants' acts a
23 significant or substantial factor -- substantial factor -- in
24 bringing about the harms. There is no question that there
25 were. He has the bruises, he has the abrasions, he has all the

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Summation - Mr. Novich

1 injuries to support that.

2 Now let's briefly talk about Gunsett and Mazzella's
3 counterclaims for assault and battery, because that may come up
4 during the discussion.

5 If you find that Mr. Hawks was acting in self-defense
6 when he just had his one right arm and the only other thing he
7 could use is his teeth to get these officers off him, then
8 their assault and battery claim is done, it is over. If he was
9 acting in self-defense, that is a defense to assault and
10 battery.

11 They also concede -- they have to admit -- that they
12 have no significant injuries. So you should just reject the
13 assault and battery claim as is.

14 Let's talk about Mr. Hawks' damages. The judge is
15 going to instruct you that if you find the defendants liable,
16 one of the things you have the power to do is to award
17 compensatory damages. That is bodily injuries, that is
18 emotional distress and mental anguish. You have that power to
19 do that.

20 You saw, again, the photographs. You saw the medical
21 evidence. You know the injuries that he sustained. You also
22 heard that -- to add insult to injury -- he was not only beaten
23 up but then he was charged and then he was found guilty in a
24 system that -- and I don't care if this is the way the system
25 works, if nobody gets this. It is not right. No jury, no jury

D7OHHAW2

Summation - Mr. Novich

1 trial. That is not right. No lawyer. You just have inmates,
2 who aren't even lawyers, who knows what their legal education
3 is. And what, Ms. Kim suggested you are supposed to go to the
4 guards. Really? Ask yourself, would you go to the guards for
5 help.

6 What did you hear from officer Mazzella? This guy got
7 60 months, five years in SHU, in the box, which he described
8 for you. That is 23 hours a day in a confined cell. Based on
9 what? Officer Mazzella appearing by telephone? By telephone
10 at the disciplinary hearing?

11 We have a broken system of justice, a system that
12 doesn't work, and you need to fix it. The way we fix this is
13 you make them pay. If you don't make them pay, it ain't
14 getting fixed. The only way it gets fixed is if you make them
15 pay because that is the only time they are going to pay
16 attention.

17 Now, I briefly want to go over with you the verdict
18 form. The judge is going to give you that. This is the
19 verdict form you are going to get from the judge. You are
20 going to take it back there when you deliberate.

21 So question No. 1, plaintiff's excessive force claim.
22 You are going to have this back there too. Question No. 1: Do
23 you find that plaintiff Brian Hawks has proven by a
24 preponderance of the evidence that any of the defendants
25 (Clifford Gunsett, David Mazzella, Eladio Cruz, Corey

D7OHHAW2

Summation - Mr. Novich

1 Graveline) used excessive force on plaintiff in violation of
2 his federal constitutional rights. Then it gives you Clifford
3 Gunsett, David Mazzella, Eladio Cruz and Corey Graveline. Yes
4 or no.

5 Mazzella and Gunsett, those are yeses. Those are
6 yeses. Officer Cruz and Graveline, I leave that to your
7 discretion.

8 Now let's talk about -- you should answer those
9 questions as to Gunsett and Mazzella yes. Once you answer yes,
10 then you go to question No. 2.

11 Question No. 2: What amount of compensatory damages,
12 if any -- again, the quality is poor. I apologize. But you
13 are going to get this back there. What amount of compensatory
14 damages, if any, has plaintiff Brian Hawks proven were
15 proximately caused by defendants use of excessive force? If
16 none, indicate none.

17 Again, remember what I said, you heard about the
18 injuries, you heard about the 60 months in the box. If you
19 want this justice system fixed, if you are unhappy with what
20 you heard and how it works, you have to make them pay. If you
21 don't make them pay, it's not getting fixed. You put the
22 number down there.

23 Now there is a question 3, that if you don't award
24 compensatory damages, you can award nominal damages and you can
25 indicate the amount. Again, I would say just answer question

D7OHHAW2

Summation - Mr. Novich

1 No. 2, put in the right amount. Nominal damages are minimal
2 damages. I would say this question -- it is up to you -- this
3 question, move on.

4 Answer question No. 1 yes as to the defendants;
5 question No. 2, put an amount that is going to make them fix
6 it; and then question No. 3 skip over.

7 THE COURT: I am going to instruct you further about
8 the verdict sheet and how you go about reaching any
9 determinations that are called for on the verdict sheet.

10 MR. NOVICH: Thank you, your Honor.

11 Then question No. 4: Do you find that plaintiff Brian
12 Hawks should be awarded punitive damages against one or more of
13 the defendants if you found that defendant liable. Gunsett and
14 Mazzella, yes. If you want the system fixed, they have to pay.
15 You have got to put yes. As to the other defendants, again,
16 you saw the evidence. I leave it to your discretion what you
17 think is right and appropriate.

18 All right. I apologize. There are also questions
19 regarding Gunsett and Mazzella's counterclaims.

20 Do you find that defendant Clifford Gunsett and David
21 Mazzella have proven by a preponderance of the evidence that
22 plaintiff Brian Hawks assaulted them, basically. The answer to
23 those questions are no, for the reasons I said. Self-defense,
24 if you believe he was acting in self-defense. The evidence
25 supports that, and no significant injuries. No, no.

D7OHHAW2

Summation - Mr. Novich

1 The next question: Do you find the defendants
2 Clifford Gunsett and David Mazzella have proven by a
3 preponderance of the evidence that plaintiff Brian Hawks
4 committed battery against Clifford Gunsett and David Mazzella.
5 Same answers. No, no. That is question No. 2 on their assault
6 and battery claim.

7 Then questions 3 and 4. If you have answered no and
8 no, you don't have to answer, you don't have to put a response
9 to those questions.

10 Same thing with question 5. If you find no assault
11 and battery, you just put no to those questions as well. Then
12 the foreperson will sign it and the judge will instruct you how
13 it will be handed up and so forth.

14 All right. So I want to thank you for your service.
15 As I said at the beginning, it is not easy to sit on a jury. I
16 appreciate your patience. We have tried to keep this as short
17 as possible to get you back to your work and to your personal
18 commitments and so forth, and I hope I have accomplished that.

19 But what I asked you for in return is to do justice in
20 this case, and justice in this case is to make them pay for
21 what they did to Mr. Hawks for the excessive force and for
22 beating him.

23 Thank you.

24 THE COURT: Ms. Kim, anything further?

25 MS. KIM: No, your Honor. Thank you.

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Charge

1 THE COURT: So, ladies and gentlemen, we are at the
2 point where I am going to read you the jury instructions. This
3 will probably take an hour or so. When I am finished, you will
4 go back in the jury room. Your lunch will be there by then.
5 You can have lunch, talk, whatever you want to do starting at
6 that time.

7 I should tell you that it is my practice to give each
8 of the jurors a copy of these instructions. I know a lot of
9 you are taking notes, and you are free to do that, but this is
10 pretty long. You will each have your own copy of these exact,
11 same instructions when you go back there, and they are as
12 follows:

13 Members of the jury, you are about to enter your final
14 duty, which is to decide the fact issues in this civil case.
15 Please pay close attention to the instructions. I will be as
16 clear as possible.

17 You have now heard all of the evidence in the case as
18 well as the final arguments of the lawyers for the parties and
19 my duty at this point is to instruct you as to the law. It is
20 your duty to accept these instructions of law and apply them to
21 the facts as you determine them, just as it has been my duty to
22 preside over the trial and decide what testimony and evidence
23 is relevant under the law for your consideration.

24 On these legal matters, you must take the law as I
25 give it to you. If any attorney has stated a legal principle

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Charge

1 different from any that I state to you in my instructions, it
2 is my instructions that you must follow.

3 You should not single out any instruction as alone
4 stating the law, but you should consider my instructions as a
5 whole when you retire to deliberate in the jury room. You will
6 receive a copy of these instructions, as I mentioned, to take
7 with you into the jury room.

8 You should not, any of you, be concerned about the
9 wisdom of any rule that I state. Regardless of any opinion
10 that you may have as to what the law may be -- or ought to
11 be -- it would violate your sworn duty to base a verdict upon
12 any other view of the law than the one I give to you.

13 Your role, as I have said before, is to consider and
14 decide the fact issues in this case. You, the members of the
15 jury, are the sole and exclusive judges of the facts. You pass
16 upon the evidence; you determine the credibility or
17 believability of the witnesses; you resolve whatever conflicts
18 may exist in the testimony; and you draw whatever reasonable
19 inferences and conclusions you decide to draw from the facts as
20 you have determined them, and you determine also the weight of
21 the evidence.

22 In determining the facts, you must rely upon your own
23 recollection of the evidence. What the lawyers have said in
24 their opening statements, in their closing arguments, in their
25 objections, or in their questions is not evidence. Nor is

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Charge

1 anything I may have said during the trial or may say during
2 these instructions about a fact issue to be taken instead of
3 your own independent recollection. What I say is not evidence.
4 It is your own independent recollection of the evidence that
5 controls. In this connection, remember that a question put to
6 a witness is never evidence. Only the answer is evidence. But
7 you may not consider any answer that I directed you to
8 disregard or that I directed struck from the record or that was
9 given after an objection was sustained.

10 If there is any difference or contradiction between
11 what any lawyer has said and what you decide the evidence
12 showed, or between anything I may have said and what you decide
13 the evidence showed, it is your view of the evidence -- not the
14 lawyers and not mine -- that controls.

15 And since you are the sole and exclusive judges of the
16 facts, I do not mean to indicate any opinion as to the facts or
17 what your verdict should be. The rulings I have made during
18 the trial are not any indication of my views of what your
19 decision should be as to whether the plaintiff or the
20 defendants have presented the more convincing evidence.

21 I also ask you to draw no inference from the fact that
22 upon occasion I may have asked questions of certain witnesses.
23 These questions were intended only for clarification or to move
24 things along, and certainly were not intended to suggest any
25 opinions on my part as to the verdict you should render or

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Charge

1 whether any of the witnesses may have been more credible than
2 any other of the witnesses. It is important that you
3 understand that I wish to convey no opinion as to the verdict
4 you should render in this case, and that if I did convey such
5 an opinion, you would not be obliged in any way to follow it.

6 In determining the facts, you must weigh and consider
7 the evidence without regard to sympathy, prejudice or passion
8 for or against any party and without regard to what the
9 reaction of the parties or the public might be to your verdict.
10 I will later discuss with you how to pass upon the credibility
11 of witnesses.

12 As this is a civil case, the plaintiff, Brian Hawks,
13 has the burden of proving his claims and damages by a
14 preponderance of the evidence. Similarly, because they have
15 asserted counterclaims, defendant officers Clifford Gunsett and
16 David Mazzella have the burden of proving their counterclaims
17 and damages by a preponderance of the evidence. This means
18 that both the plaintiff, with respect to his claims, and
19 defendants Gunsett and Mazzella, with respect to their claims,
20 have the burden of proving by a preponderance of the evidence
21 each and every disputed element of their respective claims and
22 any damages resulting therefrom.

23 If you find that the plaintiff has failed to establish
24 his claims by a preponderance of the evidence, you must decide
25 against him on the issues you are considering. If you find

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Charge

1 that defendants Gunsett or Mazzella have failed to establish
2 their counterclaims by a preponderance of the evidence, you
3 must decide against them or either of them on the issues you
4 are considering.

5 To establish a fact by a preponderance of the evidence
6 means to prove that the fact is more likely true than not true.
7 A preponderance of the evidence means the greater weight of the
8 evidence. It does not mean the greater number of witnesses or
9 the greater length of time taken by either side. The phrase
10 refers to the quality of the evidence; that is, its convincing
11 quality, the weight and the effect that it has on your minds.

12 The law requires that in order for either the
13 plaintiff or defendants Gunsett and Mazzella to prevail on
14 their respective claims, the evidence that supports their
15 claims must appeal to you as more nearly representing what took
16 place than the evidence opposed to their respective claims. If
17 it does not, or if it weighs so evenly that you are unable to
18 say that there is a preponderance on either side, then you must
19 decide the question in favor of the party against whom such
20 claims are brought. It is only if the evidence favoring a
21 party's claims outweighs the evidence opposed to it that you
22 can find in favor of such party.

23 (Continued on next page)
24
25

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Charge

1 THE COURT: This concept of preponderance of the
2 evidence is often illustrated with the idea of scales, you put
3 on one side all the credible evidence favoring one party and on
4 the other all the credible evidence favoring the other party.
5 If the scales tip toward the party making a claim because such
6 party's evidence is weightier, then you must find in such
7 party's favor. But if the scales are evenly balanced, or if
8 they tip in favor of the party opposing such claim, then you
9 must find for the party opposing such claim. Remember, it is
10 the party making a particular claim that has the burden of
11 proof on that claim. Some of you no doubt have heard of proof
12 beyond a reasonable doubt, which is the standard of proof is
13 that used in a criminal trial. A plaintiff in civil case does
14 not have to satisfy that requirement, and you should put it out
15 of of your mind.

16 So let's talk a minute about what evidence is. The
17 evidence from which you are to decide what the facts are
18 consists of the following:

19 1. The sworn testimony of witnesses, on both direct
20 and cross-examination, regardless of who called the witness;
21 and

22 2. The documents and exhibits which have been
23 received into evidence.

24 Nothing else is evidence; not what the lawyers say,
25 not what I say, not anything you may have heard outside the

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Charge

1 courtroom.

2 Remember, when we started I said there were two kinds
3 of evidence: One is direct and one is circumstantial. Direct
4 evidence is direct proof of a facts, such as testimony by a
5 witness about what that witness personally experienced through
6 his or her own senses -- so something seen, something felt,
7 something touched, heard or tasted for example. Direct
8 evidence may also be in the form of an exhibit.

9 Circumstantial evidence is evidence which tends to
10 prove a disputed fact by proof of other facts. There is a
11 simple example of circumstantial evidence we use in the court
12 and it goes as follows: Let's assume that when you came in the
13 courthouse this morning the sun was shining and it was a nice
14 day. Let's assume further that the courtroom blinds, as they
15 pretty much are, were drawn and you could not look outside. As
16 you were sitting here, let's say someone walked in the
17 courtroom through the back door with an umbrella that was
18 dripping wet and then a few minutes later another person
19 entered that door with a wet umbrella. Now, on the facts that
20 I have given you, you cannot look out of the courtroom because
21 the blinds, as I say, are drawn and you cannot see for yourself
22 whether or not it is raining. So you have no direct evidence
23 of that fact. But on the combination of facts which I asked
24 you to assume, it would be reasonable and logical for you to
25 conclude that it had been raining.

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Charge

1 That is all there is to circumstantial evidence. You
2 infer on the basis of reason and experience and common sense
3 from one established fact the existence or nonexistence of some
4 other fact.

5 Circumstantial evidence is of no less value than
6 direct evidence; the law makes no distinction between direct
7 evidence and circumstantial evidence but simply requires that
8 your verdict must be based on a preponderance of the evidence
9 of all the evidence presented.

10 It is for you to decide whether a fact has been
11 proven. In making that decision, you must consider all the
12 evidence related to that fact in light of reason, common sense,
13 and your experience.

14 During the trial you may have heard attorneys use the
15 term "inferences," and in their arguments they may have asked
16 you to infer on the basis of your reason, experience and common
17 sense, from one or more proven facts the existence of some
18 other facts.

19 An inference is not a suspicion or a guess. It is a
20 logical conclusion that a disputed fact exists that we reach in
21 light of another fact which has been shown to exist.

22 There are times when different inferences may be drawn
23 from facts, whether proved by direct or circumstantial
24 evidence. It is for you, and you alone, as the jurors to
25 decide what inferences you will draw.

D7O6HAW3

Charge

1 The process of drawing inferences from facts in
2 evidence is not a matter of guesswork or speculation. An
3 inferences is a deduction or conclusion which you, the jury,
4 are permitted to draw -- but are not required to draw -- from
5 the facts which have been established by either direct or
6 circumstantial evidence. In drawing inferences, you should
7 exercise your common sense.

8 Keep in mind that the mere existence of an inference
9 against the defendants does not relieve the plaintiff of the
10 burden of establishing his claims by a preponderance of the
11 evidence. Nor does the existence of an inference relieve the
12 plaintiff relief the defendants Gunsett and Mazzella of the
13 burden of establishing their counterclaims by a preponderance
14 of the evidence. In order for the plaintiff or defendants
15 Gunsett or Mazzella to obtain a verdict on their respective
16 claims, you must still plea of from the credible evidence that
17 the plaintiff or defendants Gunsett and Mazzella, respectively,
18 have sustained the burden cast upon them. If the party making
19 a claim has failed, then your verdict must be for the party
20 opposing the claim. If you should find that all of the
21 evidence is evenly balanced, then the party making the claim
22 has not sustained the burden of proof and your verdict should
23 be for the party opposing the claim.

24 If, and only if, you determine, after carefully
25 weighing all the evidence that the facts favor the party making

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Charge

1 a claim by the standard I have articulated, then such party has
2 met its burden of proof.

3 Let's talk a bit about credibility of witnesses. You
4 have had the opportunity to observe the witnesses on the
5 witness stand and now it is your job to decide how believable
6 each witness was in his testimony. You are the sole judges of
7 the credibility of each witness and of the importance of the
8 witness testimony.

9 So how do you determine whether the truth lies? Well,
10 you should use all the tests for truthfulness that you would
11 use in determining matters of importance to you in your every
12 day lives. You should consider any bias or hostility that a
13 witness may have shown for or against any party as well as any
14 interest the witness has in the outcome of the case. It is
15 your duty to consider whether the witness has permitted any
16 such bias or interest to color his or her testimony.

17 You should consider the opportunity to witnesses had
18 to see, hear and know the things a which they had testified,
19 the accuracy of their memory, their candor or lack of candor,
20 their intelligence, the reasonableness and probability of their
21 testimony and its consistency or lack of consistency and its
22 corroboration or lack of corroboration with other believable
23 testimony. You watched the witness testify. Everything a
24 witness said or did on the witness stand counts in your
25 determination. How did the witness appear? What was the

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Charge

1 witness' demeanor while testifying? Often it is not what
2 people say but how they say it that moves us.

3 In deciding whether to believe a witness, keep in mind
4 that people sometimes forget things. You need to consider,
5 therefore, whether in such a situation the witness' testimony
6 reflects an innocent lapse of memory or an intentional
7 falsehood, and that may depend on whether it has to do with an
8 important fact or with only a small detail.

9 If you find that any witness has willfully testified
10 as to a material fact (that is, to say as to an important
11 matter), the law permits to you disregard completely the entire
12 testimony of that witness upon the principle that one who
13 testifies falsely about one material fact is likely to testify
14 falsely about everything. You are not required, however, to
15 consider such a witness totally unworthy of belief. You may
16 accept so much of the witness' testimony as you deem true and
17 disregard what you feel is false. As the sole judges of the
18 facts, you the jurors must decide which of the witnesses you
19 will believe, what portion of their testimony you accept, and
20 what weight you will give to it.

21 In other words, what you must do in deciding
22 credibility is to size a witness up in light of his or her
23 demeanor, the explanations given and all of the other evidence
24 in the case. Always remember you should use your common sense,
25 your good judgment, and your own life experience.

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Charge

1 In evaluating the credibility of witnesses, you should
2 take into account any evidence that a witness may benefit in
3 some way from the outcome of this case. Such interest in the
4 outcome creates a motive to testify falsely and may sway a
5 witness to testify in a way that advances the witness' own
6 interest. Therefore, if you find that any witness whose
7 testimony you are considering may have an interest in the
8 outcome of this trial, then you should bear that factor in mind
9 when evaluating the credibility of his testimony, and accept it
10 with great care.

11 Keep in mind, though, that it does not automatically
12 follow that testimony given by an interested witness is to be
13 disbelieved. An interested witness is not necessarily less
14 credible than a disinterested witness. The fact that a witness
15 is interested in the outcome of the case does not mean that he
16 has not told the truth. It is for to you decide, based upon
17 your own perceptions and common sense, to what extent, if at
18 all, the witness's interest has affected his testimony.

19 You are to perform the duty of finding facts without
20 bias or prejudice as to any party. You are to perform your
21 final duty in an attitude of complete fairness and
22 impartiality.

23 The fact that the plaintiff is an inmate and that the
24 defendants are corrections officers entitles them to no greater
25 consideration than that afforded to any other party in the

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Charge

1 litigation. By the same token they are entitled to no less
2 consideration. All parties stand as equals before the bar of
3 justice.

4 The defendants in this case are Clifford Gunsett,
5 David Mazzella, Eladio Cruz, and Cory Graveline. The state of
6 New York is not on trial as a party in this action, and neither
7 is the New York State Department of Corrections and Community
8 Supervision.

9 Similar act evidence. This is the instruction that I
10 mentioned several times during the trial, also during
11 summations in part and I will mention it again now.

12 You heard testimony regarding other incidents of
13 assaults involving plaintiff and law enforcement officials. As
14 I instructed you when the evidence was introduced, the
15 testimony may only be used for the limited purposes of:

16 One, determining Officer Mazzella's motive and intent
17 in restraining plaintiff; two, in determining whether plaintiff
18 had the requisite intent and motive to commit assault and
19 battery on officers Gunsett and Mazzella; three, in determining
20 whether plaintiff's injuries, if any, were proximately caused
21 by any of the defendants' actions; or four, in determining the
22 amount of compensatory damages, if any, that should be awarded
23 in this case.

24 Testimony regarding other incidents in which plaintiff
25 may have been involved may not be considered for the purpose of

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Charge

1 proving plaintiff's propensity to engage in the altercation
2 described in this case or proving that plaintiff was at fault
3 in the altercation here. Specifically, you may not find that,
4 simply because plaintiff was involved in other assaults with
5 other officers on other occasions, plaintiff has a propensity
6 for violence and, thus, it is more likely than not that he
7 proved the altercation the altercation and/or committed the
8 assault and battery on defendant officers in this case.

9 You have also heard evidence that at some earlier time
10 a wit has said or done something or failed to say or do
11 something that counsel has argued -- counsel for either side,
12 is inconsistent witness' trial testimony.

13 Evidence of a prior inconsistent statement is not to
14 be considered as affirmative evidence in determining liability.
15 Evidence of a prior inconsistent statement was placed before
16 you for the more limited purpose of attacking the credibility
17 of the witness. If you find that the witness has made an
18 earlier statement that conflicts with his trial testimony, you
19 may consider that fact in deciding how much of his trial
20 testimony, if any, to believe.

21 In making this determination, you may consider whether
22 the witness purposely made a false statement or whether it was
23 an innocent mistake; whether the inconsistency concerns an
24 important fact, or whether it has to do with a small detail;
25 whether the witness had an explanation for the inconsistency;

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Charge

1 and whether that explanation appealed to your common sense.

2 It is exclusively your duty as jurors, based upon all
3 the evidence and your own good judgment, to determine whether
4 the prior statement was inconsistent and, if so, how much, if
5 any, weight to give to the inconsistent statement in
6 determining whether to believe all or part of the witness'
7 testimony.

8 So now we come to what are called or referred to as
9 the substantive charges, that is to say the legal claims and
10 and the analysis of the legal claims.

11 So plaintiff's claims are under federal law, statute
12 is called 42, United States code, Section 1983. Plaintiff
13 Brian Hawks has asserted claims against defendants Clifford
14 Gunsett, David Mazzella, Eladio Cruz, and Cory Graveline.
15 Under federal statute, as I say, called Title 42, United States
16 Code, Section 1983, you should consider each defendant
17 individually with respect to the claim against them when you
18 deliberate. Plaintiff alleges that the defendants each used
19 excessive force against him in violation of his rights under
20 the Eighth Amendment of the United States Constitution. This
21 claim of excessive force will be further explained in a minute.
22 For now I want to quote to you Section 1983 of this Title 42 of
23 the United States Code.

24 It read as follows: Every person who, under color of
25 any statute, ordinance, regulation, custom or usage of any

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Charge

1 state or territory or the District of Columbia, subjects or
2 causes to be subjected, any citizen of the United States or
3 other person within the jurisdiction thereof to the deprivation
4 of any rights, privileges, or immunities secured by the
5 Constitution and laws, shall be liable to the party injured in
6 an action at law, suit in equity, or other proper proceeding
7 for redress.

8 To establish a claim under this Title 42, Section
9 1983, plaintiff must establish by a preponderance of the
10 evidence each of the following three elements: First, that the
11 conduct complained of was committed by a person acting under
12 color of state law; second, that the conduct complained of
13 deprived the plaintiff of rights, privileges or immunities
14 secured by the Constitution or laws of the United States; and
15 third, that the defendants' acts were the proximate cause of
16 any injuries and damages sustained by the plaintiff.

17 I will now examine each of these elements in greater
18 detail. So now we're talking about plaintiff's claim against
19 the defendants. After we will talk about the two defendants
20 claim against the plaintiff. 42, U.S.C., Section 1983 for now.
21 So I am going to talk about these three elements which I say
22 compromise a claim under that statute be then I will explain
23 those three elements in more detail.

24 First element: Color of state law. The first
25 elements of plaintiff's claim is that defendants, Correction

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Charge

1 Officers Clifford Gunsett, David Mazzella, Eladio Cruz, and
2 Cory Graveline acted under color of state law. In this case,
3 it is not disputed that the defendants were acting in their
4 official capacity as corrections officers employed by the New
5 York State Department of Corrections and, therefore, that they
6 were acting under the color of state law. The parties agree
7 that defendants were acting under color of state law. So that
8 is the first element.

9 Your job, though, will be to determine whether
10 plaintiff has established by a preponderance of the evidence of
11 evidence, the remaining elements of Title 42, U.S.C., Section
12 1983.

13 The second remaining element is called deprivation of
14 a federal right. The second element of plaintiff's claim is
15 that defendants intentionally deprived the plaintiff of a
16 federal right, privilege, or immunity, which in this case
17 refers to the right not to be subjected to excessive force
18 while in prison. In order for the plaintiff to establish this
19 element as to each of the defendants, he must prove by a
20 preponderance of the evidence: First, that the defendants
21 committed the acts alleged by the plaintiff; second that in
22 committing the acts alleged, the defendant acted intentionally;
23 and third, that the acts of defendants caused the plaintiff to
24 suffer the deprivation of a federal right.

25 I have used some terms here and now I will define

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Charge

1 them.

2 Commission of the acts. As already noted, plaintiff
3 must prove by a preponderance of the evidence that the
4 defendants committed the acts alleged by plaintiff.

5 I have also used the word "intentionally." An act is
6 intentional if it is done knowingly; that is, if it is done
7 voluntarily and deliberately and not because of mistake,
8 accident, negligence or other innocent reason. Use of
9 excessive force also involves malicious or sadistic behavior as
10 will be further explained in a minute or two by me. In
11 determining whether the defendants acted with the requisite
12 state of mind, you should remember that while witnesses may see
13 and hear and so be able to give direct evidence of what another
14 person does or fails do, they have no way of looking into
15 another person's mind. Therefore, you have to determine the
16 defendants' state of mind based on what occurred and what the
17 people involved said was in their minds and your belief or
18 disbelief with respect to those facts.

19 Deprivation of a federal right. The plaintiff must
20 also prove by a preponderance of the evidence the deprivation
21 of a federal right. The right at issue here is the right not
22 to be subjected to excessive force while in prison. The Eighth
23 Amendment to the United States Constitution, which prohibits
24 cruel and unusual punishment, protects inmates from being
25 subjected to excessive force by prison officials. In this

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Charge

1 case, the plaintiff claims that he was subjected to excessive
2 force by each of the defendants.

3 Now, let me talk about this excessive force claim
4 against an inmate in a little bit more detail. Some of this is
5 repeat, some of things that I have said, but it is worth taking
6 the time.

7 The Eighth Amendment to the United States
8 Constitution, which prohibits cruel and unusual punishment,
9 protects inmates from being subjected to malicious or sadistic
10 uses of physical force by prison officials.

11 In this case, plaintiff claims that all defendants
12 used excessive force on him on November 1, 2007 at the Fishkill
13 Correctional Facility while plaintiff was awaiting transport
14 back to Green Haven Correctional Facility following a medical
15 appointment.

16 In order to establish his claim for a violation of the
17 Eighth Amendment, the plaintiff must prove that defendants used
18 force against him maliciously, for the purpose of causing harm,
19 rather than in good-faith effort to maintain or resist store
20 discipline. It is not enough to show that, in hindsight, the
21 amount of force seems unreasonable; the plaintiff must show
22 that the defendants used force maliciously, for the purpose of
23 causing harm. When I use the word "maliciously," I mean
24 intentionally injuring another person without just cause or
25 reason, and doing so with excessive cruelty or delight in the

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Charge

1 cruelty. Plaintiff must also prove that defendants' use of
2 force caused some physical injury to him. In deciding whether
3 plaintiff has proven this claim, you should consider whether
4 the defendants used force against the plaintiff, whether there
5 was a need for the application of force, and the relationship
6 of that need for force, if any, and the amount of force
7 applied. In considering whether there was a need for force,
8 you should consider all of the relevant facts and circumstances
9 that defendants reasonably believed to be true at the time of
10 the encounter. Such circumstances can include whether
11 defendants reasonably perceived a threat to the safety of
12 staff, including themselves, or inmates, and if so, the extent
13 of that threat. In addition, you should consider whether
14 defendants made any efforts to temper the severity of the force
15 they used.

16 You should also consider whether plaintiff was
17 physically injured and the extent of plaintiff's injuries. But
18 a use of force can violate the Eighth Amendment even if it does
19 not cause significant injury. Although the extent of any
20 injuries to plaintiff may help you assess whether use of force
21 was legitimate, a malicious and sadistic use of force violates
22 the Eighth Amendment even if it produced no significant
23 physical injury.

24 Remember, I said there were three elements to this
25 claim. Here is the third, so-called proximate cause element.

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Charge

1 The third element that the plaintiff must prove by a
2 preponderance of the evidence is that the defendants' wrongful
3 acts were a proximate cause of any injuries sustained by the
4 plaintiff. Proximate cause means that there must be a
5 sufficient causal connection between the wrongful act or
6 omission of a defendant and any injury or damage sustained by
7 the plaintiff. An act or omission is a proximate cause if it
8 was a substantial factor in bringing about or actually causing
9 injury; that is, if the injury or damage was a reasonably
10 foreseeable consequence of the defendant's acts or omission.
11 If an injury was a direct result or a reasonably probable
12 consequence of a defendant's wrongful act or omission, then it
13 was proximately caused by such act or omission. In other
14 words, if a defendant's wrongful act or omission had such an
15 effect in producing the injury that reasonable persons would
16 regard it as being the cause of the injury, then the act or
17 omission is a proximate cause.

18 In order to recover damages for any injury, the
19 plaintiff must show by a preponderance of the evidence that
20 such injury would not have occurred without the conduct of the
21 defendant you are considering. If you find that the defendants
22 have proved, by a preponderance of the evidence, that the
23 plaintiff in this case asserts an injury which would have
24 occurred even in the absence of defendants' conduct, you must
25 find that the defendants did not proximately cause plaintiff's

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Charge

1 injury.

2 Although there are four defendants in this case, it
3 does not follow from that fact alone that if one or more
4 defendant is liable, any other defendant is liable. Each
5 defendant is entitled to a fair consideration of the evidence
6 relating to the plaintiff's claims and that defendant's own
7 conduct and defenses, and each defendant is not to be
8 prejudiced by any finding you make for or against any other
9 defendant.

10 Let's explore that in a little more detail. Again,
11 although there are four defendants in this trial are being
12 represented by the same attorney, you are not to treat them as
13 one person. Each defendant is entitled to a fair, separate and
14 individual consideration of the case without regard to your
15 decision as to the other defendants. In order to prove a claim
16 under Section 1983, the plaintiff must establish that the
17 defendants were personally involved in and caused the
18 deprivation of his rights. Therefore, in order for a given
19 defendant to be liable, plaintiff must show that the individual
20 defendant caused a violation of plaintiff's rights.

21 You must also be careful to impose any damages that
22 you may award on a claim solely upon the defendant or
23 defendants you find liable on that claim. Again, although
24 there are four defendants in this case, it does not follow that
25 if one is held to be liable, all or any one of the other others

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1 are liable as well. If you find that only one defendant is
2 responsible, for example, for a particular injury, then you can
3 only impose damages for that injury upon that defendant.

4 You might find that more than one defendant is liable
5 for a particular injury. If two or forepersons unite in an
6 intentional act that violates another person's right, then all
7 of those persons are jointly liable for the acts of each of
8 them; the law does not require the injured party to establish
9 how much of the injury was done by each particular defendant
10 that you find liable. If you decide that two or more of the
11 defendants are jointly liable on a particular claim, then you
12 may simply determine the overall amount of damages for which
13 they are liable, without breaking that figure down into
14 individual percentages.

15 So those are the instructions with respect to
16 plaintiff's claim against the four defendants. Now we're
17 talking about the counterclaims, which are considered under
18 state law, New York State law.

19 So in addition to plaintiff's claims against
20 defendants under federal law, two of the defendants, Officers
21 Clifford Gunsett and David Mazzella, have alleged two state law
22 counterclaims against the plaintiff, which are: One, assault,
23 and two, battery. In order to prevail on any one or more of
24 these state claims, each element of each claim must be
25 established by Defendants Gunsett and Mazzella by a

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1 preponderance of the evidence. If any claim is not established
2 by a preponderance of the evidence, it must be resolved in
3 favor of plaintiff.

4 You must consider each claim separately, and you must
5 return a separate verdict as to each claim and each defendant.
6 Your verdict as to each claim and each defendant must be
7 determined solely upon the evidence, or lack of evidence, as to
8 that claim and that defendant.

9 So let's talk first a little bit about assault and
10 then a little bit about battery and then we'll turn to how you
11 go about considering damages.

12 Assault. One who has the real or apparent ability to
13 cause imminent harmful bodily contact and intentionally does a
14 menacing act which threatens such contact to another person
15 commits an assault upon that person if the act causes
16 apprehension of such contact in that person. A party is liable
17 for assault when he intentionally causes another person to
18 become concerned that the party is about to cause a harmful or
19 offensive bodily contact. In order to commit an assault, the
20 assailant must have the real or apparent ability to bring about
21 that harmful or offensive bodily contract. There must be some
22 menacing act or gesture that causes the plaintiff to believe
23 that a harmful or offensive bodily contact is about to occur.
24 It is not necessary in fact that there be any contact.

25 Now the word "plaintiff" here is used as the person

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Charge

1 making the claim, not the plaintiff in this case.

2 Defendant Gunsett claims that the plaintiff in this
3 overall case punched him and Defendant Mazzella claims that
4 plaintiff bit him on his arm. If you find that the plaintiff
5 Mr. Hawks punched Defendant Gunsett and/or bit Defendant
6 Mazzella, and that plaintiff intended by doing so to cause
7 defendants Gunsett and/or Mazzella to become apprehensive that
8 a harmful or offensive bodily contact was about to occur, and
9 that plaintiff had the real or apparent ability for carry out
10 the threat, and that defendants Gunsett and/or Mazzella had
11 such apprehension, you will find that plaintiff committed an
12 assault.

13 If you find that plaintiff did not voluntarily punch
14 Defendant Gunsett or that he did not bite Defendant Mazzella,
15 or that plaintiff did not intend to cause either or both
16 defendants to become apprehensive that harmful or offensive
17 bodily contact was about to occur, or that the defendants
18 Gunsett and/or Mazzella did not become apprehensive, you will
19 find that plaintiff did not commit an assault. That is the law
20 of assault.

21 Battery. One who, in a hostile manner, touches the
22 person of another, without his consent and with the intention
23 of causing harmful bodily contact to such other person, commits
24 a battery. As with assault, intent involves the state of mind
25 with which the act is done. The intent required for battery is

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Charge

1 intent to cause a bodily contact that a reasonable person would
2 find offensive. An offensive bodily contact is one that is
3 done for the purpose of harming another or one that offends a
4 reasonable sense of personal dignity, or one that is otherwise
5 wrongful.

6 Defendants Gunsett and Mazzella claim that plaintiff
7 punched, Mr. Hawk, him and bit Defendant Mazzella on his arm.
8 If you find that plaintiff intentionally punched Defendant
9 Gunsett and/or that plaintiff intentioanlly punched and/or bit
10 Defendant Mazzella, and that said contact was offensive, you
11 will find that plaintiff committed a battery. If you find that
12 plaintiff did not intentionally punch Defendant Gunsett and/or
13 that plaintiff did not intentionally punch or bite Defendant
14 Mazzella, or that, although plaintiff may have done so, the
15 contact was not offensive, you will find that plaintiff did not
16 commit battery.

17 Now, before we get to damages, let's talk about the
18 concept of self-defense.

19 Plaintiff claims that he was acting in self-defense
20 and therefore is not liable for any damages to defendants
21 Gunsett or Mazzella. Plaintiff has the burden of establishing
22 self-defense by a preponderance of the evidence. In order to
23 establish self-defense, plaintiff must establish that he
24 reasonably believed that defendants Gunsett and Mazzella were
25 attacking or about to attack him and that the force that

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Charge

1 plaintiff used to prevent injury to himself was reasonable
2 under the circumstances.

3 If you find that plaintiff had a reasonable belief
4 that he was facing a physical attack from defendants Gunsett
5 and/or Mazzella, and that the force plaintiff used was
6 reasonable under the circumstances, you will find that
7 plaintiff was acting in self-defense and is not liable for
8 assault and/or battery. If you find that plaintiff did not
9 have a reasonable belief of that he was facing a physical
10 attack from defendants Gunsett and/or Mazzella, or that even if
11 he did, the force that plaintiff used was not reasonable under
12 the circumstances, you will find that plaintiff was not acting
13 in self-defense and therefore is liable for assault and/or
14 battery.

15 Now damages.

16 Do you want it take a break or do you want me to keep
17 going?

18 If you find that the plaintiff has carried his burden
19 of proving, by a preponderance of the evidence, his claim
20 against any of the defendants, then you must consider the
21 amount of damages that will fairly and reasonably compensate
22 plaintiff for the injuries he has proven he sustained as a
23 result of the conduct of the defendants. Likewise, if you find
24 that either defendants Gunsett or Mazzella have carried their
25 burden of proving, by a preponderance of the evidence, any of

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Charge

1 their counterclaims against the plaintiff, then you must
2 consider the amount of damages that will fairly and reasonably
3 compensate them for the injuries they have proven they
4 sustained as a result of plaintiff's conduct.

5 The fact that I am charging you on the issue of
6 damages does not mean that plaintiff is entitled to prevail on
7 his claims or that defendants Gunsett or Mazzella are entitled
8 to prevail on their counterclaims. That is for you to decide.
9 I instruct you on this subject only in the event you decide,
10 that plaintiff has sustained his burden of proof with respect
11 to liability and that damages are appropriate, or, that either
12 Defendant Gunsett or Mazzella has sustained his burden of proof
13 with respect to the liability for his counterclaim and that
14 damages are appropriate to him.

15 Let's talk first about the idea of compensatory
16 damages under federal law. Remember, plaintiff's claim is
17 under federal statute. Then we'll talk about damages under
18 state law. Remember that defendants' counterclaims are under
19 state law.

20 So I will now give you instructions for awarding what
21 are called compensatory damages. This is under federal law.
22 First, the fact again that I am instructing you on how to award
23 damages does not mean that I have any opinion on whether you
24 should decide for or against any of the parties and award
25 damages. It is for you to decide on the evidence presented and

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1 the rules of law, which I have given you, whether any party is
2 entitled to recover damages from the other. If you find that
3 none of the parties have sustained their burden of proof with
4 respect to liability, then you need not consider damages at
5 all.

6 If you return a verdict for the plaintiff on his
7 excessive force claim, then you must award him such sum of
8 money as you believe will fairly and justly compensate him for
9 any injury you believe he actually sustained as a direct
10 consequence of the conduct of the defendants.

11 You should award compensatory damages only for those
12 injuries which you find that plaintiff has proven by a
13 preponderance of the evidence and which you find to have been
14 the direct result of conduct of the defendant whose conduct
15 violated the plaintiff's federal rights. You may only award
16 compensatory damages for pain and suffering or the mental
17 anguish and distress which plaintiff has shown he has suffered
18 as the result of any injuries you find he experienced. You
19 must award damages only for those injuries that are a direct
20 result of conduct by a defendant which violated plaintiff's
21 federal rights.

22 Any damages awarded must be solely based upon the
23 individual defendant's personal involvement. If you find only
24 one party is liable for an injury, then damages for that injury
25 must only be imposed upon that party.

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Charge

1 You might find that more than one defendant is liable
2 for a particular injury. If two or more persons unite in an
3 intentional act that violated another person's right (here in
4 the use of excessive force that is alleged), then all of those
5 persons are jointly liable for the acts of each of them. The
6 law does not require the injured party to establish how much of
7 the injury was done by each of the particular defendant that
8 you find is liable. If you decide that more than one of the
9 defendants are jointly liable on a particular claim, then you
10 may simply determine the overall amount of compensatory damages
11 for which they are liable, without breaking that figure down
12 into individual percentages.

13 Compensatory damages must not be based on speculation
14 or sympathy. They must be reasonable and based upon the
15 evidence presented at trial.

16 Now, there is also something called nominal damages.
17 If you return a verdict for the plaintiff under Section 1983
18 but find that plaintiff has failed to prove by a preponderance
19 of the evidence that he suffered actual damages, then you must
20 return an award of damages in some nominal or token amount not
21 to exceed the sum of one dollar.

22 Nominal damages must be awarded when a plaintiff has
23 been deprived by a defendant of a constitutional right but has
24 suffered no actual damage as a natural consequence of that
25 deprivation. The mere fact that a constitutional deprivation

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Charge

1 has occurred is an injury to the person entitled to enjoy that
2 right, even when no actual damages flow from the deprivation.
3 Therefore, if you find that plaintiff has suffered no actual
4 injury as a result of the defendants' conduct, apart from a
5 constitutional deprivation, you must award nominal damages not
6 to exceed one dollar.

7 And then there is the concept of punitive damages. In
8 addition to compensatory or nominal damages, you may make a
9 separate and may make a separate and additional award of
10 exemplary or punitive damages for plaintiff's claims. Punitive
11 damages are awarded to punish a defendant for extreme or
12 outrageous conduct, or to deter or prevent a defendant or
13 others like them from committing such conduct in the future.

14 You may award the plaintiff punitive damages against
15 any of the defendants whom you find liable, if you find the
16 that plaintiff has proven by a preponderance of the evidence
17 that the defendant acted maliciously or wantonly. An act is
18 malicious if it is done in such a manner, and under such
19 circumstance, as to reflect utter disregard for the potential
20 consequences of the act on the rights of others. An act is
21 wanton if it is done in reckless or callus disregard of, or
22 indifference to, to the rights of others. Plaintiff has the
23 burden of proving, by a preponderance of the evidence, that a
24 defendant act maliciously or wantonly. The purpose of punitive
25 damages is to punish for outrageous conduct and to set an

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Charge

1 example to deter others from the commission of similar offenses
2 in the future. An award of punitive damages is discretionary.
3 If you find that the legal requirements for punitive damages
4 are satisfied, then you may decide to award punitive damages,
5 or you decide not to award them. You should always bear in
6 mind that such extraordinary damages may be aloud only if you
7 should first unanimously award the plaintiff a verdict for
8 compensatory or nominal damages. In making this decision, you
9 should consider the underlying purpose of punitive damages.

10 Punitive damages are awarded in the jury's discretion
11 to punish a defendant for outrageous conduct or to deter him
12 and others like him from performing similar conduct in the
13 future. Thus, in deciding whether to award punitive damages,
14 you should consider whether the defendants may be adequately
15 punished by an award of actual damages only, or whether the
16 conduct is so extreme and outrageous that actual damages are
17 inadequate to punish the wrongful conduct. You should also
18 consider whether actual damages standing alone are likely to
19 deter or prevent the defendants from again performing any
20 wrongful acts that they may have performed, or whether punitive
21 damages are necessary to provide deterrence. Finally, you
22 should consider whether punitive damages are likely to deter or
23 prevent other persons from performing wrongful acts similar to
24 those the defendants may have committed.

25 If you decide if you decide that punitive damages

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Charge

1 should be awarded in this case, the sum of money to be awarded
2 as punitive damages will be determined in a separate phase of
3 this trial. In other words, after you render a verdict that,
4 if you do, that plaintiff should receive punitive damages, if
5 you do so, the parties will present additional evidence about
6 the sum of money they think is appropriate. When they have
7 finished, you will then again retire to the jury room to
8 deliberate and to decide the sum of money that should be
9 awarded to plaintiff as punitive damages. That is another
10 step. All you must do at this time, however, when you go back
11 to the jury room, is determine whether the requirements for
12 awarded with punitive damages have been met, and whether, in
13 your discretion, punitive damages should be awarded in this
14 case.

15 Now let's talk about damages under state law. It is
16 similar to but not in every respect exactly the same as damages
17 under federal law. If you decide that defendants Gunsett
18 and/or Mazzella have proven by a preponderance of the evidence
19 that plaintiff is liable with respect to one or more of their
20 state law claims -- now we're talking about assault or
21 battery -- then they entitled to recover a sum money which will
22 justly and fairly compensate them for any injury and conscious
23 pain and suffering to date they sustained as a direct
24 consequence of plaintiff's conduct.

25 If you find defendants Gunsett and Mazzella are

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1 entitled to a verdict in their favor on either of their
2 counterclaims in accordance with these instructions but do not
3 find that they have sustained substantial or actual damages,
4 then you may return a verdict for defendants' Gunsett and
5 Mazzella in some nominal amount such as one dollar.

6 Punitive damages, again, under state law. If you find
7 from a preponderance of the evidence in the case that
8 defendants Gunsett or Mazzella are entitled to a verdict for
9 compensatory or nominal damages, and you further find that the
10 act of plaintiff, which proximately caused actual injury or
11 damage to the defendant, was done maliciously or wantonly, then
12 you may, but are not required to, decide to award punitive
13 damages in addition to the compensatory or nominal damages
14 already awarded. As in considering whether plaintiff should be
15 awarded punitive damages on his claim, in making this decision,
16 you should consider the underlying purpose of punitive damages
17 to, which is to punish a person for outrageous conduct or to
18 deter him and others like him from performing similar conduct
19 in the future.

20 If you decide that punitive damages should be awarded
21 with respect to Defendant Gunsett and/or Defendant Mazzella,
22 the sum of money to be awarded as punitive damages will again
23 will be determined in a separate phase of this trial, after
24 which the parties will present evidence about the amount of
25 punitive damage that should be awarded and after which you will

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1 deliberate and decide the amount of money to award. Second
2 stage for punitive damages as we discussed before. All you
3 must decide at this time or must determine at this time is
4 whether the requirements for awarding punitive damages have
5 been met, and whether, in your discretion, punitive damages
6 should be awarded in this case.

7 Now, ladies and gentlemen, you are about to go into
8 the jury room and begin your deliberations. Before you do go,
9 I will just talk to the lawyers for 30 seconds and then I will
10 come back and we'll let you go. All of the exhibits will be
11 given to you at the start of deliberations. I think in your
12 case the lawyers have done at least two binders, each of which
13 is the a duplicate of the other and has all the others of both
14 sides. If you want any of the testimony read, you may also
15 request that, but please remember that we do not have
16 necessarily daily written transcripts available. So if you do
17 ask for testimony, the court reporter must search through his
18 or her notes and the lawyers must agree on what portions of the
19 testimony may be called for. If they disagree, I need to
20 resolve those disagreements. So that can be a time-consuming
21 process and so please try and be as specific as you possibly
22 can in requesting the portions of the testimony if, in fact,
23 you do so.

24 Your request for testimony and in fact any
25 communication with me with the Court once you start your

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1 deliberations, should be made in writing in a note. You will
2 have a pad back there -- signed by the foreperson -- and given
3 to one of the marshals who will be outside the door of the jury
4 room. We'll talk about foreperson in a minute. In any event,
5 do not tell me or anyone else at that time how the jury stands
6 on any issue until after a verdict is reached.

7 We're going to get to foreperson in a moment. Let me
8 talk about the verdict first. The most important part of this
9 case, members of the jury, is the part that you as jurors are
10 now about to play as you deliberate on the issues of fact. It
11 is for you, and you alone, to decide whether the plaintiff or
12 defendants Gunsett and Mazzella have sustained their burden of
13 proof as I have explained it to you with respect to each
14 element of their respective claims. If you find that plaintiff
15 has succeeded in proving his excessive force claim, you should
16 return a verdict in his favor. If you find that the plaintiff
17 has failed to sustain his burden on any element of his
18 excessive force claim, you should return a verdict in favor of
19 defendants.

20 If you find if a defendants Gunsett and Mazzella have
21 sustained their burden of proof with respect to any of their
22 counterclaims, you should return a verdict in their favor on
23 that counterclaim. If you should find that the defendant
24 Gunsett and Mazzella failed to sustain their burden on any
25 element of any counterclaim, you should return a verdict in

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1 favor of plaintiff on that counterclaim.

2 I know you will try the issues that have been
3 presented to you according to the oath that you have taken as
4 jurors and that oath you promise that you would well and truly
5 try the issues in this case and a true verdict render. It is
6 your duty as jurors to consult with on another and deliberate
7 with a view to reaching an agreement. Each of you must decide
8 the case for yourself, but you should do so only after a
9 consideration of the case with your fellow jurors and you
10 should not hesitate to change an opinion when convinced that is
11 it erroneous. Every juror should be heard. No one juror
12 should hold the center stage in the jury room and no one juror
13 should control or monopolize the deliberations.

14 Your verdict must be unanimous, but you are not bound
15 to surrender your honest convictions concerning the affect or
16 weight of the evidence for the here purpose of returning a
17 verdict or solely because of the opinion of others jurors.
18 Discuss and weigh your respective opinions dispassionately
19 without regard to sympathy, without regard to prejudice or
20 favor for either party, either side, and adopt that conclusion
21 which in your good conscience appears to be in accordance with
22 the truth.

23 We talked about foreperson a minute ago. Your
24 foreperson will preside over the deliberations and speak for
25 you the jury in open court.

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1 THE COURT: The foreperson, though, has no greater
2 voice or authority than any other juror. The foreperson will
3 send out notes and when the jury has reached a verdict, he or
4 she will notify the marshal via a jury note that a verdict has
5 been reached.

6 I am going to ask you as the first order of business
7 when you go back into the jury room is to select your
8 foreperson. The first juror, the last juror or any juror in
9 between. It is entirely up to you. But as soon as you have
10 done that, please send me a note, signed by the foreperson,
11 whoever that turns out to be, that so-and-so has been selected
12 the jury foreperson. Do that first, if you would.

13 I am also going to give you a verdict sheet or form to
14 be filled in by the jury. We have heard some discussion about
15 that. That form, the purpose of that form and the questions on
16 the form is to help us -- that is to say, me, the court, and
17 the counsel for the plaintiff and the defendants -- to
18 understand what your findings are. I am going to hand this
19 form, which contains a set of questions, to Christine and she
20 will give it to you so that you may record the decision of the
21 jury with respect to each question.

22 No inference is to be drawn from the way the questions
23 are worded as to what the answer should be. The questions are
24 not to be taken as any indication that I have any opinion as to
25 how you should answer them. I have no such opinion and, as I

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Charge

1 said before, even if I did, it would not be binding on you.

2 Before the jury attempts to answer any question, it is
3 my strong recommendation that you read the entire set of
4 questions and make sure that everybody understands each
5 question. So we have claims by plaintiff against defendants.
6 We also have claims by two defendants against plaintiff. So
7 there are questions related to each of those claims and there
8 are questions related to damages pertaining, if any, to each of
9 those claims. So I think you should, as I say, read the whole
10 form, understand it, before you start to fill it out or fill it
11 in.

12 You will find at the end there is a place for
13 everybody's signature as jurors and for the date.

14 Before you answer the questions, you should deliberate
15 in the jury room and discuss the evidence that relates to the
16 questions that you have to answer. When you have considered
17 the questions thoroughly, and the evidence that relates to
18 those questions, then record the answers to the questions on
19 the form that I give you. Remember, all answers must be
20 unanimous. And the verdict sheet has to be signed by all the
21 jurors.

22 So finally -- my closing comment -- I say this not
23 because I think it is necessary but because it is the custom in
24 this court. Treat each other with courtesy and respect during
25 your deliberations, as I know you will do. After you have

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1 reached a verdict, your foreperson will fill in the verdict
2 sheet that will be given to you, sign it and date it and advise
3 the marshal outside your door that you are ready to return to
4 the courtroom with a verdict.

5 I stress that you should be in agreement with the
6 verdict which is announced in court. Once a verdict is
7 announced by the foreperson in open court and officially
8 recorded, it cannot ordinarily be revoked.

9 All litigants stand equal in this courtroom. All
10 litigants stand equal before the bar of justice. All litigants
11 stand equal before you. Your duty is to decide between these
12 parties fairly, between and among these parties fairly and
13 impartially, to see that justice is done, all in accordance
14 with your oath as jurors.

15 I thank you for your time and attentiveness up until
16 now. We have moved along pretty nicely, I think. If you just
17 remain seated for one more minute while I talk to the lawyers
18 outside just for a minute or less and then we will ask you to
19 follow the marshal. We will swear in the marshal and then ask
20 him to lead you to the jury room.

21 (Jury not present)

22 THE COURT: We always ask after the instructions are
23 read if anybody has any objection to the way they were read as
24 opposed to the substantive instructions which were the
25 discussion of our charge conference.

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1 MS. KIM: No.

2 MR. NOVICH: No, your Honor.

3 THE COURT: So we are going to give the case to the
4 jury, swear in the marshal, and if you are going to go to lunch
5 or whatever -- they have their lunch probably sitting on the
6 table back there. As long as you tell Christine how we can
7 reach you in case we get a note or cell phone or whatever.

8 MR. NOVICH: My cell phone is checked in downstairs.
9 So what I was going to do is go to the cafeteria.

10 THE COURT: Eighth floor.

11 MR. NOVICH: I could just come right back if that is
12 easier.

13 THE COURT: If you don't mind. That's fine.

14 I don't think we have another case, do we?

15 THE DEPUTY CLERK: We don't.

16 MS. KIM: I will leave you my cell phone number.

17 (Jury present)

18 THE COURT: We will ask the court officer to please
19 come forward and Christine will swear you in.

20 (Marshal sworn)

21 THE COURT: Just one more comment. I mentioned it
22 before. You are certainly welcome to take your notes back
23 there. But remember, the notes are not evidence. They are
24 just your notes maybe to refresh an individual's recollection,
25 but they are not evidence in the case.

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1 Great job so far. I think your lunch will be there
2 when you get there.

3 (At 1:07 p.m., the jury retired to deliberate)

4 THE COURT: OK. Whatever you want to do, we will get
5 ahold of if we hear something from the jury.

6 MR. NOVICH: Thank you, your Honor.

7 MS. KIM: Thank you, your Honor.

8 THE COURT: Thanks very much.

9 (Luncheon recess)

10 (Continued on next page)

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A F T E R N O O N S E S S I O N

THE COURT: Two things. First is I want to put on the record what is called juror note No. 1, which indicates -- yes, it is juror note No. 1, but it also indicates that juror No. 1 is the foreperson. That would be Mr. Holodak. I mentioned it to counsel earlier but I wanted to make sure the record reflected it, and I will make their note a court exhibit.

The other thing is that I would like to send the jury a note, which you all have in front of you, saying that we usually end deliberations at 4:45, and it is now 4:25, and then pick up the next day promptly at 9:30 a.m. I included a sentence in there: Is that agreeable with you?

MR. NOVICH: Just a small little thing, Judge. Where you say is that agreeable to you?

THE COURT: Did I not?

MR. NOVICH: I think it says is the agreeable to you.

THE COURT: I will make it that. Good catch.

Is that OK, though, to send that note with that correction?

MS. KIM: Yes.

THE COURT: Is that all right with you, Mr. Novich?

MR. NOVICH: Yes, Judge.

THE COURT: We also filled up two pitchers of water for the jury through the marshal.

MR. NOVICH: Judge, can we impose on Christine maybe

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Charge

1 to get us some more too, or somebody.

2 THE COURT: Water?

3 MR. NOVICH: Yes. Because I think we are all out.

4 THE COURT: When Jackie comes back with those, we will
5 ask her to help you out.

6 MR. NOVICH: Thank you very much.

7 (Pause)

8 THE COURT: So the jury responded saying that: We
9 have made good progress on our deliberations and feel that we
10 are ready to break for the day. We will return tomorrow to
11 continue deliberations at 9:30.

12 I am going to call them in anyway and give them my
13 usual instructions about conduct between now and then. So
14 let's do that.

15 (Jury present; time noted 4:38 p.m.)

16 THE COURT: So I have got your note back in response
17 to mine which indicated that you are ready to break for today
18 and that you would be back in the jury room by 9:30 tomorrow to
19 resume deliberations, and that works just fine. We will have
20 coffee and tea for you in the morning. But I just wanted to
21 call you out to remind you of the instructions that I normally
22 give when we break for the day.

23 The first is, please don't deliberate between now and
24 tomorrow at 9:30. Jurors deliberate when everybody is in the
25 room together at the same time. That would mean all eight of

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Charge

1 you.

2 Second, please don't speak with anyone else about the
3 case or anyone who has anything to do with the case, and
4 speaking in the broadest possible sense, internet, social
5 media, phone, and of course person to person.

6 Third, don't stay in the presence of others who might
7 talk to you about the case unless you are all in the jury room
8 deliberating. And if someone should try and talk to you about
9 the case, please advise Christine or myself.

10 Fourth, please don't read any stories or TV or radio
11 stories or listen to or view them about the case, assuming
12 there were any. And last, please don't do any research about
13 the case on your own.

14 I would appreciate if you could leave your notes
15 behind in the jury room with whatever materials. We will
16 safeguard the jury room and we will have it unlocked for you
17 first thing in the morning when you get back. So great job.
18 Thanks very much and we will see you tomorrow.

19 (Jury excused; time noted 4:40 p.m.)

20 THE COURT: So if you all could be here tomorrow at
21 9:15. The plan would be that they will show up and once they
22 are all together, there is no need for me to call them out.
23 Presumably that would be around 9:30 and they would just
24 continue their deliberations.

25 I don't know what to anticipate first thing tomorrow

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1 morning, but that is the schedule.

2 Thanks, everybody. We will see you all tomorrow.

3 (Trial adjourned to July 25, 2013 at 9:30 a.m.)